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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 691

ERIE-LACKAWANNA RAILROAD COMPANY,
Appellant,

— against —

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE PENNSYLVANIA RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT, ERIE-LACKAWANNA RAILROAD COMPANY

Appendices A, B, C, D and E are printed in a separate Volume

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BRIEF OF APPELLANT, ERIE-LACKAWANNA RAILROAD COMPANY

OPINIONS BELOW AND INTERSTATE COMMERCE COMMISSION REPORTS

The Order appealed from is that of a three-Judge statutory Court (28 U.S.C. §§ 2284, 2325). A majority opinion was filed by Circuit Judge Henry J. Friendly (District Judge Richard H. Levet concurring) and a dissenting opinion by District Judge Edward Weinfeld. The opinions are not yet reported.

References herein to pages of the opinions are to the pages of Appendix A to the Jurisdictional Statement of appellants, Baltimore and Ohio Railroad Company, et al., where the two opinions are printed.

The Report of the Interstate Commerce Commission dated April 6, 1966 (released April 27), which authorized and approved the merger of The New York Central Railroad Company into The Pennsylvania Railroad Company, is reported at 327 I.C.C. 475-565, and a copy of the Commission's Order of April 6 is attached to the printed copy of the Report, which is included in the record before this Court.[1] **A copy of the Report and Order of April 6 is Appendix A to this brief.**

The Report of the Commission on Reconsideration, dated September 16, is reported at 328 I.C.C. 304-330, and a copy is annexed as Appendix B to the Jurisdictional Statement of appellants, Baltimore and Ohio Railroad Company, et al. The copy of the September 16 Report is in the form in which it was released; later those who had received such copies were requested by the Commission to add: "Commissioners Freas and Goff did not participate". At the end of said Appendix B (pages B-46 and B-47) there is a copy of the Order of September 16 which accompanied the Report of that date. **References herein to pages of the Report and Order of September 16 are to the pages of Appendix B to said Jurisdictional Statement.**[2]

A copy of the Commission's further Order dated September 29, which fixed October 31 as the date for the commencement of the further hearing which had been directed in the Report of September 16, is annexed as Appendix C to said Jurisdictional Statement of appellants, Baltimore and Ohio Railroad Company, et al.

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[1] Exhibit A to the complaint of appellant, Erie-Lackawanna Railroad Company (R. 365-458).

[2] The copy of the Report and Order of September 16 which was before the three-Judge Court was in mimeographed form and page references thereto in the opinions below are to the mimeographed pages.

JURISDICTION

This action was commenced on September 8[3] by plaintiff, Erie-Lackawanna Railroad Company (appellant herein), under 28 U.S.C. §§ 1336, 2284 and 2321-2325 (see Appendix B hereto) to enjoin, annul or set aside the Commission's Order of April 6 as modified by certain Orders relating to the time to file petitions and the effective date of the Order of April 6, copies of which Orders are attached to plaintiff's complaint. Thereafter, and while plaintiff's motion for an interlocutory injunction was pending, the Commission issued its Report and Order of September 16 (released September 19), modifying its Report and Order of April 6. On the oral argument on September 21 of plaintiff's motion (and the motions of intervening plaintiffs and plaintiffs in companion actions, now consolidated), the Court below directed that all pleadings and pending motions be deemed to be amended so as to embrace the Order of September 16 as well as the Order of April 6 (R. 2737-2738).

The Order of the three-Judge Court denying plaintiff's motion for an interlocutory injunction was entered on October 4 (A-5 through A-39)[4]. Plaintiff's notice of appeal therefrom to this Court was filed in the District Court on October 13.

The Order of the Court below continued a temporary restraining order in effect through October 7, and provided that, if an application for a stay should be filed with the Clerk of this Court before the close of business on that day, the temporary restraining order should remain in effect "until determination of such application by the Circuit Justice or other direction by him or by the Supreme Court" (A-39). Applications for a stay were duly filed, within the

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[3] All dates herein are in the year 1966 unless otherwise indicated.

[4] Page references A-1 through A-65, B-1 through B-47 and C-1 through C-2 are to the Appendices in the Jurisdictional Statement of Baltimore and Ohio Railroad Company, et al.

time specified, by this appellant and others, and on October 11 Mr. Justice Harlan, to whom the applications had been submitted, referred them to the Court for disposition pursuant to Rule 50(6).

Three appeals having been duly filed, with jurisdictional statements and motions to accelerate consideration, on October 18 this Court issued an Order providing for a stay and granting the motions to accelerate in accordance with an expedited schedule set forth in the Order.

This Court has jurisdiction to review the Order of the Court below on direct appeal under 28 U.S.C. § 1253. *United States* v. *Drum*, 368 U. S. 370, 373 (1962) and *United States* v. *Georgia Public Service Commission*, 371 U. S. 285, 287 (1963). 28 U.S.C. § 2101(b) allows 30 days from the date of such an order for a direct appeal therefrom to this Court.

QUESTIONS PRESENTED

In its Report of April 6 approving the Penn-Central merger the Commission found that the service which Erie-Lackawanna Railroad Company (E-L), The Delaware and Hudson Railroad Corporation (D&H) and Boston and Maine Corporation (B&M) "render their shippers is essential and the public interest dictates that it be preserved"; that those three railroads "would be adversely affected by the proposed merger to a serious degree and would be severely handicapped in providing required transportation to the highly industrialized areas they serve"; that conditions should be "imposed to obviate impairment or serious weakening of E-L, D&H or B&M, or the rendering of them individually or collectively substantially less capable of providing service to their shippers and connections"; and that "unless they are protected during the period necessary to determine their future, [the Commission] would not authorize consummation [of the merger] at this time, even though approving the merger".

In an effort to provide the necessary protection for E-L, D&H and B&M the Commission fashioned and incorporated in its Report and Order of April 6 so-called "protective conditions", which were novel and complex.

The protective conditions were determined upon without any hearing, opportunity for argument (oral or written) or notice.

E-L (and D&H and B&M also) considered the protective conditions as adopted inadequate to accomplish their announced purpose, because of grave deficiencies in both substance and wording.

Early in July they duly filed petitions for reconsideration, rehearing and other relief, on which the Commission did not act in any way prior to its Report of September 16, hereinafter mentioned.

Petitions by the seven "unprotected carriers" (see page 13, footnotes 12, 13) were also filed which (1) challenged the legality of the protective conditions or similar conditions and/or (2) asked that the petitioners have similar conditions for their protection.

E-L commenced its action on September 8, at which time the "effective date" of the Commission's Order was September 30.

On September 19, two days before the scheduled argument in the Court below of the motions for an interlocutory injunction made by E-L and other plaintiffs, the Commission released its Report and Order of September 16 in which it found that E-L, D&H and B&M had "raised valid issues as to interpretation, application, scope, and other aspects of the protection".

The Commission directed that there be a further hearing with respect to both categories of protective conditions (see pages 19-20). As to the "traffic conditions", any modification would become effective "as of the date prescribed in

a modification order", and in the meantime the original traffic conditions imposed by the April 6 Report would remain in effect. The "indemnification condition" was "rescinded"; if any were adopted after the further hearing, it would apply retroactively to the date of the consummation of the merger.

The Commission decided in favor of prompt consummation of the merger.

Under the Commission's Order of September 16 the protection of E-L, D&H and B&M after consummation of the merger, which the Commission found to be essential in the public interest, would consist of

1. Until some unknown future date, only the traffic conditions prescribed in the April 6 Report (which had been objected to as seriously defective), plus a hope that there would eventually be a retroactive indemnification condition the terms of which could not be foretold.

2. A hope that a further Order or Orders of the Commission, effective at some unknown future date, would provide for traffic conditions and an indemnification condition that would be adequate.

The questions presented are:

I

Whether the District Court did not err by failing to hold that the Commission's course, as summarized above, was not authorized by, and was not consistent with, the statutory provisions quoted at pages 7-10.

II

Whether the District Court did not err by failing to hold that the Commission's Report of September 16 did not give adequate "reasons" for its decision in favor of "prompt consummation of the merger", or the "basis therefor", as required by Section 8(b) of the Administrative Procedure Act, and whether certain important findings did not lack the support of "reliable, probative, and substantial evidence"

within the meaning of Section 7(c), so that under Section 10(e) its action was unlawful.

III

Whether the District Court did not err by denying plaintiff's motion for an interlocutory injunction on the basis of the Court's own judgment (largely predicated on beliefs, suppositions and conjectures that were not supported by the record before it) that it was in the public interest to have a prompt consummation of the merger, notwithstanding that the reasons on which the Commission had reached the conclusion that a prompt consummation of the merger was in the public interest, as set forth in the Commission's Report on Reconsideration of September 16, clearly failed to support that conclusion.

STATUTES INVOLVED

The following statutes are involved in this case and are printed in Appendices to this brief as indicated below:

Appendix B: 28 U.S.C. §§ 1253, 1336, 1398, 2101(b), 2284, 2321-2325.

Appendix C: §§ 5(1), 5(2)(a), (b), (c) and (d), 5(4), 5(9) and 5(11) of the Interstate Commerce Act (49 U.S.C. § 5).

Appendix D: §§ 5(a), 5(b), 7(c), 8(b) and 10(e) of the Administrative Procedure Act (5 U.S.C. §§ 1004(a), 1004(b), 1006(c), 1007(b) and 1009(e)).

The following provisions of the statutes involved would appear to be the most important for the purposes of this appeal:

Section 5(4) of the Interstate Commerce Act makes a merger of The Pennsylvania Railroad Company and The New York Central Railroad Company unlawful unless approved and authorized by the Commission pursuant to Section 5(2).

The second sentence of Section 5(2)(b) provides:

> "* * * a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest."

The Commission's Report and Order of April 6 followed a public hearing. There was no further hearing prior to the issuance of the Report and Order of September 16.

The next sentence of Section 5(2)(b) relates directly to principal issues on this appeal:

> "If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: * * *"

Section 5(2)(c) provides, in pertinent part:

> "(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; * * *"

The following provisions of the Administrative Procedure Act are considered by the appellant particularly significant:

Section 5(a), 5 U.S.C. § 1004(a):

> "(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. * * *"

Section 5(b), 5 U.S.C. § 1004(b):

"(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit. * * *"

Section 7(c), 5 U.S.C. § 1006(c):

"(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. * * * and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. * * *"

Section 8(b), 5 U.S.C. § 1007(b):

"* * * All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; * * *"

Section 10(e), 5 U.S.C. § 1009(e):

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the re-

quirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; * * *"

STATEMENT OF THE CASE.

This is an appeal from an Order of a three-Judge United States District Court for the Southern District of New York denying (one Judge dissenting) the plaintiff's motion for an interlocutory injunction enjoining the consummation of the merger of The New York Central Railroad Company and The Pennsylvania Railroad Company under Interstate Commerce Commission Orders, and accompanying Reports, dated April 6 and September 16, already mentioned.[5]

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[5] Abbreviated names or initials will be sometimes used herein as follows:

Commission	—The Interstate Commerce Commission
Penn	—The Pennsylvania Railroad Company
Central	—The New York Central Railroad Company
E-L	—Erie-Lackawanna Railroad Company, this appellant
D&H	—The Delaware and Hudson Railroad Corporation
B&M	—Boston and Maine Corporation
Court or three-Judge Court	—The Court below
New Haven	—The New York, New Haven and Hartford Railroad Company and/or the Trustees of the property of that Company appointed in reorganization proceedings under § 77 of the Bankruptcy Act pending in the United States District Court for the District of Connecticut
Merger	—The proposed merger of Penn and Central
Merged Company or Penn-Central	—The Corporation which would survive the merger, i. e., The Pennsylvania Railroad Company with its name changed to Pennsylvania New York Central Transportation Company
The "protected carriers"	—E-L, D&H and B&M
The "unprotected carriers"	—Those listed in footnotes 12 and 13 on page 13.

The merger; the several railroads; other relevant railroad unifications and inclusion proceedings.

Measured in terms of total railway operating revenues, Penn is the largest railroad in the United States and Central is the third largest. The merged company would serve every important Atlantic port from Boston to Hampton Roads; Chicago, St. Louis and other gateways to the West; and practically every large city in the Eastern District — the northeast quadrant of the United States.[6] The merger would be by far the largest railroad merger in the history of the United States and, at least as measured by some standards, perhaps the largest merger in any industry.

Erie-Lackawanna Railroad Company (E-L), this appellant, had railway operating revenues of $229,994,374 in 1965.[7] It has two main lines extending westward from New York Harbor (Hoboken, N. J.) through Binghamton, N. Y. to Hornell in western New York. From Hornell one main line goes to Buffalo and another to Chicago. E-L reaches many important cities between Hoboken and Chicago, as far south as Dayton, Ohio and as far north as Oswego, N. Y. It has the largest export-import traffic to and from New York Harbor of any railroad, and reaches Chicago by its own lines and St. Louis through connections. The Chicago and St. Louis gateways handle traffic to and from the west and southwest.

For the protection of E-L, of The Delaware and Hudson Railroad Corporation (D&H) and of Boston and Maine Corporation (B&M) against the adverse consequences of a Penn-Central merger, the Commission fashioned "protective conditions" in the Report of April 6, and E-L, D&H and

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[6] See paragraph 7 of E-L's complaint, no allegation of which has been denied by any defendant, at page 4 (R. 353).

[7] As to this paragraph relating to E-L, see E-L's complaint at pages 3-4 (R. 352-353) and the affidavit of Gregory W. Maxwell, submitted in support of the motion for a preliminary injunction, at page 2 (R. 945).

B&M are referred to therein and in this brief as the "protected carriers", although the adequacy of the protective conditions became a major issue before the Commission and the Court below.

E-L, D&H and B&M are jointly interested in traffic to and from New England.[8] E-L connects at Binghamton, N. Y. with D&H, which connects at Mechanicville (near Albany) with B&M, and B&M serves northern New England. The joint traffic of the three railroads to and from New England would have to compete with the merged company's traffic reaching Boston and other New England points via the Central's present lines.

E-L also has important traffic to and from New England via Maybrook, N. Y. (near Poughkeepsie), where it connects with the New Haven.[9]

E-L, D&H and B&M have been commonly referred to as "smaller" or "small" railroads. While it hardly seems realistic to characterize E-L as small, it is certainly the fact that E-L, or E-L, D&H and B&M taken together, are relatively small when compared with the proposed Penn-Central.

In 1965 the railway operating revenues of Penn and Central totaled $1,554,007,344 and the total railway operating revenues of E-L, D&H and B&M were only 21.6% of that amount.[10]

The New Haven operates approximately 1,594 miles of road in Massachusetts, Rhode Island, Connecticut and New York and had railway operating revenues of $121,434,147 in 1965.[11]

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[8] See E-L complaint, p. 4-6 (R. 353-355).

[9] See E-L complaint, p. 4, 5 (R. 353-354).

[10] See E-L complaint at p. 3-4 (R. 352-353).

[11] See E-L complaint at p. 5 (R. 354).

Seven other railroads in the Eastern District, which are appellants, have been generally referred to as the "unprotected carriers".

C&EI intervened as a plaintiff in the action brought by E-L.[12]

The remaining six "unprotected carriers" are original plaintiffs or intervening plaintiffs in the two other actions which were consolidated with that brought by E-L.[13] Listed in order of magnitude, as measured by their respective railway operating revenues in 1965, they are: N&W, B&O, C&O, Reading, CNJ and WM. The six railroads are all affiliated, or hoping to be affiliated. C&O controls B&O; B&O has a large interest in Reading, which in turn has a large interest in CNJ; B&O also has a large interest in WM. N&W and C&O are attempting to merge, as will be explained shortly.

The seven unprotected carriers will not be described herein, as it is assumed that the briefs filed on their behalf will describe them.

Certain other proceedings should be mentioned briefly:

On December 17, 1962 the Commission authorized C&O to acquire control of B&O. 317 I.C.C. 261.

On June 24, 1964, in Finance Docket No. 21510, the Commission approved the merger of New York, Chicago and St. Louis Railroad Company (the Nickel Plate) into N&W, the lease of Wabash Railroad Company, and the

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[12] Chicago and Eastern Illinois Railroad Company.

[13] B&O — The Baltimore and Ohio Railroad Company
CNJ — The Central Railroad Company of New Jersey
C&O — The Chesapeake and Ohio Railway Company
N&W — Norfolk and Western Railway Company
Reading — Reading Company
WM — Western Maryland Railway Company

purchase of the Sandusky Line. 324 I.C.C. 1. Under paragraph 1 of Appendix O to the Commission's Report (324 I.C.C. at 148), E-L, D&H and B&M were given the right to file petitions for inclusion in the Norfolk and Western System, and the Commission reserved the power to require N&W to permit the inclusion of any of the three, if it was found to be consistent with the public interest, upon terms determined by the Commission to be equitable. By paragraph 3 of Appendix O the consummation of the transaction which the Commission approved constituted "acquiescence in and irrevocable assent to the conditions stated in this appendix" by N&W.[14]

E-L, D&H and B&M all filed petitions in Finance Docket No. 21510 for inclusion in the N&W System, hearings thereon have been completed, and briefs filed. N&W has been vigorously resisting the inclusion proceedings in Finance Docket No. 21510 and has been pressing a program of its own, next to be mentioned.

On October 11, 1965, N&W and C&O filed an application in Finance Docket No. 23832 for authority to merge

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[14] Paragraphs 1 and 3 of Appendix O read as follows:

"1. For a period of 5 years following the date of the order herein the Commission will retain jurisdiction to permit the filing of petitions by the Erie-Lackawanna Railroad Company, The Delaware and Hudson Railroad Corporation, and the Boston and Maine Railroad for inclusion in the Norfolk & Western system. Upon the filing of such petition or petitions, the attendant facts and circumstances will be appraised upon the basis of an appropriate record or records then to be compiled, and if the affiliation or affiliations then sought, or some reasonable modification thereof, be found consistent with the public interest, the Commission will direct the accomplishment thereof under such terms as may be found equitable to all parties involved. It is not intended that acceptance of this condition by applicants herein will foreclose or limit review of any decision of the Commission disposing of a petition filed pursuant to this condition.

* * * *

"3. Consummation by the applicants of any transaction approved herein shall constitute on the part of such applicants acquiescence in and irrevocable assent to the conditions stated in this appendix."

under a plan through which E-L, D&H and B&M, and also Reading and CNJ, might be included in the proposed N&W-C&O System. On October 5, 1966[15] the Commission released an order denying a request of the applicants for a hearing and directing that "further processing of the instant applications" be held "in abeyance pending further order of the Commission." The Commission's findings made it clear that it intended to have the petitions of E-L, D&H and B&M in Finance Docket No. 21510, to be included in the *present* N&W System, decided first.

The diverse interests of the "protected carriers" and the "unprotected carriers" who are appellants.

E-L and D&H have substantially identical interests with respect to the protective conditions, *viz.*, to be assured of adequate conditions. B&M's interests would seem to be much the same, but it has not been so active or consistent in endeavoring to obtain adequate protective conditions.

The unprotected carriers are largely in accord with E-L and D&H as to the illegality of the procedure which the Commission followed, but their position conflicts sharply with that of E-L and D&H as to what protective conditions should have been, or should be, adopted.

The background of the merger application: the applicants' "vulnerable and highly sensitive financial situation".

In 1961, the last calendar year before Penn and Central filed on March 9, 1962 their joint application to merge, the applicants' financial problems appeared to be grave and their future, without merger, bleak.

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[15] This Order, dated October 4, was not released until October 5, after the decision of the three-Judge Court herein on October 4.

In 1961 Penn had consolidated net income of $17,229,491 and Central had a consolidated net income deficit of $12,484,489, making their aggregate consolidated net income only $4,745,002.[16]

In the section of the application in which the applicants undertook to show that their merger would be consistent with the public interest, the applicants included the following paragraph (p. 35):[17]

> "The economic benefits to be derived from the operation of the properties of the applicants as a combined system are essential to the continued operation of such properties in the public interest. *Since World War II, the financial condition of the railroad industry has progressively deteriorated, and this situation has caused acute problems for the Eastern railroads, including the applicants.*[18] This reflects to a large extent the steady decline in the level of freight traffic handled by Eastern railroads, despite the economic growth of the territory served. The amount of operating income produced by Eastern rail freight service has also been substantially reduced. The current levels of traffic and income can no longer sustain the existing capacity of the rail systems in the East."

Although the Commission referred in its Report of April 6 to the applicants' "vulnerable and highly sensitive financial situation" (327 I.C.C. at 519)[19] and quoted this characterization in its Report of September 16[20], the facts are that in every year from 1962 through 1965 there was an improvement in the consolidated net income of the Penn and its consolidated subsidiaries and in the consolidated net in-

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[16] Exhibit E to E-L's complaint, p. 71 (R. 537).

[17] E-L's complaint, p. 10 (R. 359).

[18] In this brief all italics are supplied.

[19] A copy of the printed Report of April 6 is Appendix A to this brief. References herein will be to the volume number and pages, as in the opinions below.

[20] Page B-9, lines 3 and 4.

come of the Central and its consolidated subsidiaries—such a great improvement that in 1965 the two Companies and their consolidated subsidiaries, taken together, had consolidated net income of $122,469,097 as compared with $4,745,002 in 1961.

This record through 1965 was before the Commission when it issued its Report of April 6.[21]

In 1966 Penn's net income for the first six months was 32.61% more than for the first six months of 1965, and Central's was 80.12% more. This record was before the Commission when is issued its Report of September 16.[22]

The developments up to the time of the April 6 Report.

The developments between the filing of the merger application and the Commission's Report of April 6 may be characterized as in the main conventional for a railroad merger proceeding before the Commission, except that the size of the two applicants, the extent of their transportation operations and the inevitable effects of such a merger upon others made the proposed transaction extraordinary.

Certain Commission findings as to E-L, D&H and B&M in the April 6 Report.

As to the effects of the proposed merger upon E-L, D&H and B&M, the Commission made certain crucially important

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[21] See Appendix 3 to E-L's petition of July 8, which is Exhibit E to E-L's complaint (R. 627-630).

[22] The Form IBS Reports for the various railroads automatically became part of the record before the Commission as filed. See footnote 21.

The percentage increases given for the first six months of 1966 are not on a consolidated basis. The Central does not release consolidated figures for portions of a year and the Reports which have to be filed with the Commission during the year do not contain consolidated figures.

findings (327 I. C. C. at 529, 532), all of which are quoted in Judge Weinfeld's dissenting opinion (A-43):

> "The service [E-L, D&H and B&M] render their shippers is essential and the public interest dictates that it be preserved. Unless somehow protected, through inclusion herein or by some other equitable means, [E-L, D&H and B&M] would be adversely affected by the proposed merger to a serious degree and would be severely handicapped in providing required transportation to the highly industrialized areas they serve." (page 529)
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> * * * *
>
> ". . . [W]e conclude that immediate consummation of the proposed merger would be consistent with the public interest, if conditions are imposed to obviate impairment or serious weakening of E-L, D&H or B&M, or the rendering of them individually or collectively substantially less capable of providing service to their shippers and connections." (page 532)[28]
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> * * * *
>
> "It is doubtful that, without inclusion in a major system, these three carriers could withstand the competition of the applicants merged, and, *unless they are protected during the period necessary to determine their future, we would not authorize consummation at this time, even though approving the merger.*" (page 532)

[28] For the majority in the Court below, Judge Friendly quoted in part, and purported to paraphrase in part, this finding and characterized his summary as containing the "vital findings from which we would not allow the Commission to depart, at least without complete explanation" (A-24, A-25). The Judge's summary reads as if the Commission had found that the conditions might be determined upon and imposed after the merger. The words *"if conditions are imposed"* are not quoted in the majority opinion; we interpret those words as calling for the imposition of protective conditions by the order which authorizes consummation of the merger.

The majority opinion had previously quoted the third of the above findings (part of which we have italicized) substantially in full (A-10), but *the majority opinion did not include it as one of the "vital findings", even though it dealt directly with the crucial question whether or not consummation of the merger should be authorized in the absence of adequate protective provisions.*

Accordingly, the Commission fashioned and imposed the so-called "protective conditions," the announced purpose of which was to protect E-L, D&H and B&M "during the period necessary to determine their future", and found (327 I.C.C. at 532):

> "Our approval of the merger for undelayed consummation shall be subject, therefore, to the conditions specifically described in appendix G."

The Commission's statutory findings and ultimate conclusions squarely based on the protective conditions prescribed in the April 6 Report and Appendix G.

When the Commission came to set forth its "Statutory Findings and Ultimate Conclusions", it found and concluded (327 I.C.C. at 547):

> "Subject to the various conditions set out in this report, including the appendixes * * * we find * * * merger of the properties and franchises of The New York Central Railroad Company into The Pennsylvania Railroad Company * * * upon the terms and conditions found herein to be just and reasonable, are transactions within the scope of section 5(2) of the Interstate Commerce Act, will be consistent with the public interest * * *."

There can, therefore, be no doubt that the protective conditions embodied in Appendix G (and the portion of the Report referred to therein) constituted an important basis on which the Commission made the statutory finding that the merger would be "consistent with the public interest".

Nor can there be any doubt that the Commission specifically found that the protective conditions thus prescribed were "just and reasonable," again using the statutory language (*id*).

The conditions—terminology.

It is suitable to define certain terms used herein:

> ***Traffic conditions:*** These conditions were intended to restrict what the merged company could do after the merger, the purpose of the restrictions being to

eliminate or minimize any adverse effects of the merger on E-L, D&H and B&M so long as the traffic conditions should be in effect.[24]

Indemnification condition: The provision for the payment of indemnification by the merged company to E-L, D&H or B&M whenever, notwithstanding the traffic conditions, it should appear, through the application of a formula, that any of the three smaller carriers had been adversely affected by the merger.[25]

Protective conditions: The traffic conditions and the indemnification condition as adopted by the Report and Order of April 6 or as they may be modified, and any substitute or substitutes therefor.

The Commission's Report of September 16 dealt not only with the protective conditions but also with what was called in the Report "capital loss indemnification" (B-37 through B-45; C-1, C-2), with which the April 6 Report had not dealt at all. On this appeal E-L will not contend that the Commission's omission of a provision for capital loss in-

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[24] The restrictions are contained in sections 1 and 2 of Appendix G. Sections 4, 5 (except for paragraph C and part of paragraph D(2)), 6, 7, 8 and 9 also apply to the traffic conditions. Appendix G is in 327 I.C.C. at 561-563.

The traffic conditions have been commonly referred to by Penn and Central as the "status quo" conditions.

[25] Section 3 of Appendix G provides for indemnification "under the circumstances and according to the plan specified in the report". The formula for determining the amount of indemnification, if any, is set forth in 327 I.C.C. at 533-534 (Appendix A hereto). There are general or summary statements on page 532.

It is assumed that the Commission intended to have the definition of the "protective period" in section 1 of Appendix G apply to the indemnification condition.

Sections 4, 5C, part of section 5D(2), section 5D(3) and sections 6, 7, 8 and 9 all appear to apply to the indemnification condition. When the Commission rescinded the indemnification condition in its Report of September 16, it referred to "paragraphs 3, 5C and all other provisions therein dealing with indemnity payments" (B-43).

demnification is a ground for reversal of the Order appealed from.[26]

No testimony, hearing or argument as to the protective conditions prior to the Commission's April 6 Report, and none thereafter except through the medium of the petitions for reconsideration, rehearing, etc.

The protective conditions were not the subject of any testimony, exhibits or arguments, written or oral, before the Commission, and prior to the service on April 27 of the Report dated April 6 no notice was given by the Commission, any division, bureau, board or examiner that the Commission was considering the conditions which were adopted in the Report. The same thing is true as to any

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[26] E-L's petition to the Commission for reconsideration, dated July 8, contained a section on this subject, although the words "capital loss indemnification" were not used (Exhibit E to E-L's complaint, p. 61-65; R. 527-531). The Report of September 16 referred to the contention in E-L's petition (B-38, lines 7-11). And E-L's complaint referred in a two-sentence paragraph to capital loss indemnification and two other subjects (par. 14, p. 13-14; R. 362-363).

However, E-L did not contend in any of the three memoranda which it filed with the three-Judge Court that what the Commission had done or failed to do with respect to capital loss indemnification was a ground for setting aside the Commission's Orders. And neither E-L's application to Mr. Justice Harlan for a stay nor its Jurisdictional Statement (see p. 13-14) made such a contention.

While E-L does not wish to minimize the possible importance of capital loss indemnification, E-L has had considerable difficulty in interpreting some of the things said by the Commission in the September 16 Report about capital loss indemnification (B-37 through B-45). Some, if not all, of any uncertainties may be removed as a result of the further hearing which began on October 31 (C-1, C-2).

One of the factors leading to E-L's decision not to press in the Court below or in this Court the matter of capital loss indemnification was a desire not to add to the complications of a case which is already complicated.

Another factor is that the findings in the April 6 Report, quoted at page 18 above, did not relate to capital loss indemnification.

other protective conditions resembling those which were adopted in the Report.

The protective conditions were thus adopted without affording E-L any opportunity to present testimony or exhibits or make any oral argument. The only remedy allowed E-L was to file a petition for reconsideration and rehearing, as hereinafter stated.

The importance, novelty and complexity of the protective conditions.

The Commission's explicit findings eliminate any need for a showing of the importance of the protective conditions.

It is undisputed that the conditions are novel (see below, p. 50).

The traffic conditions inevitably presented great intrinsic difficulties (see page 51 below and Appendix E hereto).

The indemnification condition perhaps did not necessarily present such a difficult problem as the traffic conditions, but E-L believes that two features of the formula which the Commission adopted for the determination of the amount of indemnification, if any, to be paid were grossly unreasonable and unjust to E-L.[27] Since the indemnification condition was "rescinded" by the Commission's Report and Order of September 16, it is perhaps less material now than it was before that Report was issued that the April 6 indemnification formula could not be rationally defended as "just and reasonable".

The period between the issuance on April 27 of the Report dated April 6 and the commencement of E-L's action on September 8.

The time to file petitions for reconsideration, rehearing and other relief under the Commission's Rules expired on

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[27] See paragraphs 9(b)(1) and 9(b)(2) of E-L's complaint, p. 7-9 (R. 356-358), and the portions of Exhibit E to the complaint (R. 462-646) referred to therein.

July 11 after two extensions had been granted by the Commission.

On July 8 E-L filed a detailed petition, a copy of which is Exhibit E to E-L's complaint (R. 462-646), and which was characterized in the dissenting opinion as follows (A-45):

> "The three 'protected' lines, E-L, D&H and B&M, challenged the traffic conditions as totally ineffective to achieve their intended purpose; they detailed their specific objections in comprehensive briefs filed with the Commission. They also attacked the indemnification terms as based upon an improper formula."

The majority opinion below states that the "criticisms proffered by the protected roads scarcely claimed [that the initial traffic conditions were ineffective] but rather proposed ways to make them still more effective which the Commission now intends to explore" (A-29). It is hard to understand this statement unless it was merely the intention of the majority to take issue with the use in the dissenting opinion of the words *"totally* ineffective". At other places the majority opinion made more informative references to the petitions for reconsideration.[28]

A study of relevant portions of E-L's petition for reconsideration of July 8 (Exhibit E to E-L's complaint; R. 462-646) could leave no doubt that E-L's petition contended

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[28] At page A-12 the majority opinion says that:

> "The protected carriers assailed the traffic and financial conditions as vague and insufficient in respects too numerous to mention."

At page A-29 the majority referred to the "extensive suggestions" which had been made to the Commission by the beneficiaries of the traffic conditions.

At page A-31 the opinion states that "the full and helpful criticisms by the protected roads have already been in the Commission's hands for three months."

At page A-32 the opinion referred to "proposals for clarification on which the protected carriers have so much the better of the argument."

At page A-37 the majority congratulated the Commission for "its willingness to take a fresh look * * * when significant objections were offered."

that the protective conditions were *substantially* ineffective, *seriously* inadequate. It would be wholly unreasonable to expect the Justices of this Court to make such a study. However, Appendix E to this brief, which points out some of the most serious defects of the traffic conditions, was based on the July 8 petition. As to the indemnification condition, the gross injustice to E-L of two of its outstandingly important features was set forth at pages 7-9 of E-L's complaint (R. 356-358). And we quote at page 27 below what the Commission said in its Report of September 16 (B-41).

In addition to the petitions filed by E-L and the other two "protected carriers", petitions were filed by several of the "unprotected carriers" and also by others.

On June 13 N&W, which had not been a party to the Commission proceeding, filed a petition for leave to intervene and for reconsideration, further hearing and other relief, in which, among other things, N&W contended that the protective conditions were unlawful, and specifically (but not exclusively) that the indemnification condition constituted a pooling which was prohibited by Section 5(1) of the Interstate Commerce Act (Appendix C, p. i-ii).

Subsequently, petitions were filed by C&O and B&O (jointly), Reading and CNJ which were much to the same effect, except that those petitioners did not ask for leave to intervene since they were already parties to the proceeding.

On July 11 C&EI filed a petition asking for relief along the same lines.

Several of the petitioning "unprotected carriers" contended that if the protective conditions were lawful, they should have the benefit of such conditions.

No attempt will be made herein to summarize petitions filed by non-carrier parties.

All replies to the petitions for reconsideration and other relief except one were filed by August 1; a short reply of the Department of Justice was filed by August 8.

The Commission took no action, and made no announcement, with respect to the petitions until its Report of September 16, which was released on Septemeber 19.

When the petitions for reconsideration and other relief were filed, on or before July 11, the effective date of the Order of April 6 was August 12.[29]

E-L filed petitions dated July 8 and August 11 requesting a postponement of the effective date until a specified number of days (E-L proposed 45) after final action by the Commission on the petitions and any related procedures.[30]

The gist of E-L's petitions was that, unless E-L were allowed a reasonable time after the Commission had acted on its petition of July 8, it would have to commence an action to enjoin or set aside the Commission's Order of April 6 before the Commission had acted, since it was not willing to lose or gravely jeopardize its right to a judicial review. This point was made respectfully and with almost tedious particularity in the petitions of July 8 and August 11.

As a result of E-L's petition of July 8 (and other petitions), on July 19 the Commission postponed the effective date to September 30.[31] E-L's petition of August 11 was denied on August 25 on the ground that "good cause has not been shown for further postponement of said effective date or otherwise modifying the order of July 19, 1966, as requested by petitioner".[32]

By September 7 E-L had to face certain inescapable facts: (1) as the Commission had found, consummation of the Penn-Central merger would threaten E-L's very survival unless E-L was protected by adequate protective conditions; (2) E-L was satisfied that the protective condi-

[29] Exhibit C to E-L's complaint (R. 460).
[30] Exhibits F and G to E-L's complaint (R. 648-676).
[31] Exhibit D to E-L's complaint (R. 461).
[32] Exhibit H to E-L's complaint (R. 678).

tions prescribed in the Report and Order of April 6 were not at all adequate; (3) E-L had no inkling as to what, if any, relief it would receive from the Commission as a result of its petition of July 8 for reconsideration and other relief, and not even any idea when that petition would be acted upon; (4) Penn and Central would be free to merge on or after September 30 unless the Commission again postponed the effective date of the Order of April 6 (which it had clearly indicated it would not do) or the merger was stayed by a Court; and (5) the period between September 7 and September 30 was not more than was necessary, and was perhaps not even long enough, to enable E-L to exhaust its rights to a judicial review.

Faced by such a dilemma, which was not of its choosing, E-L commenced its action on September 8.

Developments between September 8 and the release on September 19 of the Commission's Report and Order of September 16.

On September 12 two other actions were commenced by "unprotected carriers" which were subsequently consolidated for all purposes with the action brought by E-L. There were various interventions as parties plaintiff and as parties defendant. The statutory three-Judge Court was duly convened pursuant to 28 U.S.C. § 2284(1).

Motions for temporary restraining orders were put over, to be heard on September 21 by the three-Judge Court with the motions for interlocutory injunctions.

The Commission's Report of September 16,

On September 19, two days before the motions for temporary restraining orders and interlocutory injunctions were to be argued before the three-Judge Court, the Commission released its Report and Order of September 16 (B-1 through B-47).

In a section of the Report entitled "TIME OF CONSUMMATION" (B-13 through B-16) the Commission gave the reasons why it concluded that a prompt consummation of the merger would be in the public interest.

The Commission thus recognized that a principal question which it had to decide was one of *timing*—whether there should be a *prompt* consummation of the merger. And by a prompt consummation of the merger it meant a consummation authorized by an order having a September 30 effective date.

With respect to the protective conditions the Report of September 16 said (B-41):

> "On reconsideration, we are persuaded, however, that certain modifications of appendix G may be desirable. *The three protected carriers, on petition, have raised valid issues as to interpretation, application, scope, and other aspects of the protection.*"

The second sentence, which we have italicized, is quoted substantially in full in the dissenting opinion below (A-61, last sentence), but it is not even mentioned in the majority opinion.

The Commission also said (B-45):

> "We find that the matters raised on petition regarding the terms and protections of appendix G of the prior report and order, and the matter of capital loss indemnification, warrant further hearing and further consideration, * * *."

The Commission directed a further hearing and provided as to the protective conditions:

1. TRAFFIC CONDITIONS:

> Modifications of the traffic conditions are to be considered at the "further hearing" (B-44), and "such modification thereof as may be found appropriate will

be made effective as of the date prescribed in a modification order" (B-44).

In the meantime, "all traffic conditions will remain in effect, whether imposed through appendix G or elsewhere in the prior report" (B-43).

2. INDEMNIFICATION CONDITION:

"* * * the indemnity provisions of appendix G, viz., paragraphs 3, 5C and all other provisions therein dealing with indemnity payments be, and they are hereby, rescinded" (B-43, B-44).

However, "all the provisions of appendix G will be subject to the further hearing and further consideration" (B-44).

And "any provision which may be decided upon for the payment of indemnities will be made applicable retroactively to the date the merger is consummated" (B-44).

Reference has already been made at pages 20-21 above and in footnote 26 to "capital loss indemnification".

Argument, briefs and decision in the Court below.

The argument below was completed on September 21; further briefs were permitted to be filed by noon on September 27, and the decision of the Court (Judge Weinfeld dissenting) was handed down on October 4.

SUMMARY OF ARGUMENT

Penn and Central are the largest and third largest of this country's railroads. In 1965 their aggregate railway operating revenues were over a billion and one-half dollars. A merged Penn-Central would reach every important Atlantic port from Boston to Hampton Roads; Chicago, St. Louis and other gateways to the West; and practically every large city in the northeast quadrant of the United States.

While E-L is much smaller than either Penn or Central and would be dwarfed by the merged company, it is an important trunk line railroad, with operating revenues of approximately $230 million in 1965. It has the largest export-import traffic to and from New York Harbor of any railroad; reaches Chicago by one main line, Buffalo by another, and St. Louis through connections. It serves many important cities in the area served by Penn or Central or both, as far south as Dayton, Ohio and as far north as Oswego, N. Y. Important E-L traffic includes that destined to or originating in New England, which E-L serves in conjunction with D&H and B&M via Binghamton, N. Y. and Mechanicville (near Albany) and with the New Haven via Maybrook (near Poughkeepsie).

To find a railroad merger "consistent with the public interest" the Commission is required to give weight to its effect upon "adequate transportation service to the public". This means that the Commission must consider not only what advantages in improved service a merger may be expected to bring about, but also what disadvantages, in deteriorated service or even complete elimination of service by other railroads in the territory, should be foreseen.

When Penn and Central filed their application to merge in March, 1962, they included this statement as part of their showing that their merger would be in the public interest:

> "Since World War II, the financial condition of the railroad industry has progressively deteriorated, and this situation has caused acute problems for the Eastern railroads, including the applicants."

In 1961, the last calendar year before the application was filed, Penn and Central and their consolidated subsidiaries had aggregate consolidated net income of less than $5 million.

At that time, and under those circumstances, the advantages of a merger which would result in large savings were bound to seem relatively of great importance and the disadvantages, even including the adverse effects on E-L and other railroads, relatively less important.

By April 6, 1966, when the Commission approved the merger, the situation had changed dramatically. In 1965 the aggregate consolidated net income of Penn and Central and their consolidated subsidiaries was over $122 million, more than 25 times what it was in 1961. There had been a substantial increase year-by-year in the earnings of each of the two Systems, and it continued in 1966.

It would seem that as a result it was relatively less important in 1966 whether there was a "*prompt* consummation of the merger" in 1966, and relatively more important that weight be given to the expected adverse effects of the merger on E-L and others and that adequate steps be taken to eliminate or minimize those effects.

Recognizing the competitive impact which the Penn-Central merger would have on E-L, D&H and B&M, the Commission found, in its Report of April 6, 1966, that the transportation services which those carriers render are essential and that in the public interest the merger should not be consummated unless they were protected "during the period necessary to determine their future."

To protect E-L, D&H and B&M the Commission fashioned and imposed the "protective conditions". They were not merely of the greatest importance; they were novel and inevitably complex.

The Commission asked for no help from any party and afforded no party an opportunity even to make suggestions, let alone offer evidence, with respect to the protective conditions.

E-L considered the protective conditions, as adopted, seriously inadequate, (1) as to matters of substance, where the intent was fairly evident, (2) as to wording, where it was reasonably clear that the wording did not adequately express the Commission's intent, and (3) in a large area, made up of many segments, where because of the wording it was not clear what the Commission intended—in that area E-L did not know whether it was objecting to matters of substance or form or both.

Pursuant to the Commission's Rules, E-L (and D&H and B&M also) filed petitions for reconsideration, rehearing, etc. These had rested with the Commission for over two months (more than one month after all replies to the petitions had been filed), when the Commission issued its Report on Reconsideration and accompanying Order, decided September 16 and released September 19.

By the Report and Order of September 16 the Commission decided in favor of "prompt consummation of the merger".

As to the protective conditions the Commission directed that there be a further hearing with respect to both categories, the "traffic conditions" and the "indemnification condition". As to the traffic conditions, any modifications are to become effective as of a future date to be prescribed in the modification order, and in the meantime the original traffic conditions are to remain in effect. The indemnification condition was "rescinded"; after the further hearing, if any indemnification condition be adopted, it is to be retroactive to the time of consummation of the merger.

The foregoing was done against the background of the provisions of Section 5(2)(b) of the Interstate Commerce Act under which the Commission may authorize and approve a merger only if it finds that, "subject to such terms and conditions and such modifications as it shall find to be

just and reasonable", the merger "will be consistent with the public interest".

The net results were these:

1. Having found that consummation of the Penn-Central merger would not be consistent with the public interest unless conditions were imposed for the protection of E-L, D&H and B&M, and having found that further hearings were necessary for the framing of such conditions, the Commission nonetheless authorized consummation of the merger while deferring the framing of just and reasonable protective conditions to an unknown post-merger date.

2. While deferring the framing of definitive protective conditions to a post-merger date, the Commission nonetheless left in force the traffic conditions prescribed in its Report of April 6. By so doing it imposed novel and complex conditions as to which no party had ever been given any notice that such conditions might be imposed or given any opportunity to present evidence or argument at a hearing directed to such conditions. Furthermore, substantial objections to such conditions had been duly made by petitions for reconsideration, but the Commission had not passed upon the objections.

E-L contends that the course which the Commission followed was not authorized by, and was not consistent with, the provisions of the Interstate Commerce Act and the Administrative Procedure Act quoted at pages 8-10.

The District Court's denial of an interlocutory injunction, if permitted to stand, would have allowed the merger to proceed; would have deprived the District Court of the power to grant effective relief upon the entry of its final decree; and would have deprived E-L of effective judicial review of the Commission's Orders, to E-L's great detriment.

By Section 8(b) of the Administrative Procedure Act the Commission was required to state the reasons for its deci-

sion in favor of "prompt consummation of the merger". Its reasons were required to be supported by findings, and under Section 7(c) it was necessary for the findings to be supported by "reliable, probative, and substantial evidence". Otherwise its action was unlawful under Section 10(e). A section of the Report of September 16 entitled "TIME OF CONSUMMATION" undertook to set forth the Commission's reasons for its conclusion that a prompt consummation of the merger would be in the public interest. Several of the "reasons" stated by the Commission so plainly failed to meet the cited requirements of the Administrative Procedure Act that the Commission's decision in favor of "prompt consummation of the merger" was clearly unlawful.

The majority of the District Court did not base their denial of an interlocutory injunction on the reasons advanced by the Commission. Instead, the majority reached their own judgment, based largely on beliefs, suppositions and conjectures that were not supported by the record before the Court.

ARGUMENT

Preliminary

The argument herein will reflect the assumption that, when this Court referred in its Order of October 18 to "briefs on the merits" and "briefs on the merits of the case", and allowed four hours for argument, the Court expected to treat the appeals as if they were from a final judgment in favor of the defendants and as if the Court had noted probable jurisdiction. It is not contended that the wording of the Order of October 18 requires that assumption, but the citation of *Hannah* v. *Larche*, 361 U. S. 910 (1959), would seem to support it, particularly since in that case the Court, having heard oral argument as scheduled, took jurisdiction and reversed the Court below. *Hannah* v. *Larche*, 363 U. S. 420 (1960).

Furthermore, while the majority opinion below nowhere says explicitly that the majority deliberately intended to decide all of the issues before the Court on the merits, there are various statements in the opinion which support an inference that the majority was conscious that it was virtually doing so. Perhaps the most definite of such statements are to be found at pages A-18 and A-19.[33] Another is the first complete sentence on page A-16, which distinctly implies that the proposed Penn-Central merger is not "one as to whose validity there are truly serious doubts which it needs time to resolve".

In any event the lower Court's denial of E-L's motion for an interlocutory injunction was the practical equivalent of a decision on the merits in favor of the defendants. An irreversible event, the consummation of the Penn-Central merger, would have followed if this Court had not issued its Order of October 18. The practical effect of the consummation of the merger would have been to set in train the actions which so gravely threaten E-L, without any present protection for E-L except as provided by the present traffic conditions and the chance that there may be a retroactive indemnification condition.

E-L's argument will be that it should prevail on the merits because of the Commission's errors, which were plainly substantial. Nothing which took place in the Court below, and nothing in the majority opinion, tended to cure those errors in any way. And the interests of E-L and its "shippers and connections" (see above, p. 18) in having a compliance with the applicable provisions of the Interstate Commerce Act and the Administrative Procedure Act are clearly substantial.

E-L will not undertake at this time to reply to any argument which has been or may be made by any of the appellant

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[33] Starting in the ninth line on page A-18 and ending in the fifth line on page A-19.

"unprotected carriers" or by any other appellants. It is assumed that, if any reply thereto should be suitable, it can be included in E-L's reply brief, to be filed on or before January 6, 1967.

POINT I

The course which the Commission followed with respect to the protective conditions was clearly and substantially erroneous in many respects and the Commission's Orders are consequently invalid.

The course which the Commission followed with respect to the protective conditions can be summarized briefly:

1. It found on April 6 that adequate protective conditions, which would protect E-L, D&H and B&M, were indispensable in the public interest, and that it would not approve consummation of the merger without them.[34]

2. It found that the protective conditions prescribed in Appendix G to the April 6 Report and the related portions of the Report were "just and reasonable".[35]

3. It said that its approval of the merger "for undelayed consummation" was to be subject to the Appendix G conditions.[36]

4. After examining the petitions filed by the three protected carriers, it found that they had "raised valid issues as to interpretation, application, scope, and other aspects of the protection" (B-41).

5. It provided for a post-merger hearing relating to both the traffic conditions and the indemnification condition; it prescribed that any modification of the traffic conditions should be made effective as of the date fixed in the modification order, and that in the meantime the traffic conditions imposed on April 6

[34] See above at page 18.
[35] See above at page 19.
[36] See above at page 19.

should remain in effect; and it rescinded the indemnification condition but directed that "any provision which may be decided upon for the payment of indemnities will be made applicable retroactively to the date the merger is consummated".[37]

6. It authorized consummation of the merger on September 30 or at any time thereafter.

In the section of the Report of September 16 entitled "TIME OF CONSUMMATION", in which the Commission gave its reasons for authorizing a prompt consummation of the merger, it said that, recognizing the competitive impact of the merger on E-L, D&H and B&M, it had taken "two major steps", of which the second was stated to be the following (B-14):[38]

> "* * * (2) we have imposed in appendix G to the prior report (and applicants have accepted) unique conditions designed to maintain the traffic status quo for these three railroads pending final determination of their inclusion petitions; * * *."

Yet, in that same Report, as already noted (pages 27-28), the Commission substantially eliminated the Appendix G conditions except that the traffic conditions would remain in effect until modified after a further hearing (B-43 through B-45).

Of course, the September 16 Report and the Order of September 29 (C-1, C-2) contemplate that there may be modified traffic conditions, which will be effective from a

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[37] See above at pages 27-28.

[38] The first of the two major steps referred to by the Commission was stated as follows (B-14):

> "*** (1) we have provided opportunities for inclusion of E-L, D&H, and B&M in either the N&W system or the applicants' merged system; ***."

The Commission also said that it had "provided for hearing the question raised by these carriers and by N&W as to whether and to what extent the applicants should be indemnified for any permanent impairment of capital values caused by diversion of traffic to the merged company".

date to be prescribed in the order of modification, and that there may be an indemnification condition that will be retroactive to the date of the consummation of the merger. But as to what the eventual results will be, we cannot do better than quote from Judge Weinfeld's dissenting opinion (A-59):

> "None can divine what modifications will be made in traffic conditions, or whether the indemnification requirement will be continued at all, or the nature, duration or scope of any revisions of or additions to either, both or any of the requirements enumerated in Appendix G."

The Commission's basic findings in its April 6 Report, which were quoted by Judge Weinfeld (A-43) and are quoted above at page 18, relate to the first of the four considerations to which the Commission was directed by Section 5(2)(c) of the Interstate Commerce Act to give weight: "The effect of the proposed transaction upon adequate transportation service to the public."[39]

The first sentence of the first of the three quoted findings could not be more explicit:

> "The service the three petitioners [E-L, D&H and B&M] render their shippers is essential and the public interest dictates that it be preserved."

The Commission's finding that the protective conditions which it prescribed on April 6 were "just and reasonable" was required by Section 5(2)(b) of the Interstate Commerce Act.[40]

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[39] Section 5(2)(c) also directs the Commission to give weight to "the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction" (Appendix C, p. iii). However, E-L does not contend on this appeal that the Commission should have provided now for the inclusion of E-L in the new Penn-Central System.

[40] The pertinent portion of Section 5(2)(b) of the Interstate Commerce Act is quoted at page 8 above.

By the Report and Order of September 16 the Commission changed drastically the conditions which it had found to be "just and reasonable". It made no finding that the changed conditions, the terms of which "none can divine", will be "just and reasonable".

The Report of September 16 contains a section entitled "TIME OF CONSUMMATION" (B-13 through B-16) in which, in an evident effort to comply with the requirements of Section 8(b) of the Administrative Procedure Act,[41] the Commission set forth its reasons for deciding in favor of a prompt consummation of the merger. Insofar as the Commission's statement of its reasons related to the protective conditions, it was plainly "arbitrary" and "capricious" within the meaning of Section 10(e) of the Administrative Procedure Act,[42] because the Commission referred to the original Appendix G protective conditions just as if they were going to continue in effect, and the Report later provided that they should not (B-43, B-44).

A. The Commission's findings clearly fail to support its Order of September 16, which authorized consummation of the merger on the terms and conditions set forth in the Report of September 16.

The majority opinion states (A-25):

> "The decision on reconsideration in which, after careful review of the objections, the Commission reiterated 'that the public interest requires prompt consummation of the proposed merger' is not merely an implicit but an explicit finding that it is in the public interest for the merger to be consummated on the basis proposed."

The dissent takes issue with this conclusion of the majority on four grounds (A-50 through A-52), all of

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[41] See above at page 9.

[42] See page 9 above.

which E-L considers sound. Only one will be developed herein.

The words quoted by the majority are to be found at the end of the section of the September 16 Report, already mentioned, which is entitled "TIME OF CONSUMMATION" (B-13 through B-16). There is nothing in that section which can be called a finding, whether explicit or implicit, that the changed conditions relating to the protection of E-L, D&H and B&M (B-42 through B-44) are "just and reasonable".

Under Section 5(2)(b) a finding that the conditions are "just and reasonable" was mandatory and such a finding was made with respect to the original Appendix G conditions.[43] There is no such finding, relating to the changed conditions, in the section of the September 16 Report to which we have just referred, or elsewhere in the Report. Indeed, as has been noted, the section of the Report which gives the reasons for the Commission's conclusion "that the public interest requires prompt consummation of the proposed merger" reads as if the original Appendix G conditions were to be left unchanged (B-14).

Where in the Report of September 16 can we find the "careful review of the objections" which was mentioned in the majority opinion (see p. 28 above)? Since the quoted sentence from the opinion is to be found in a long paragraph which relates only to the protective conditions (A-24, A-25, A-26), the opinion certainly implies that the Report of September 16 carefully reviewed the objections which had been made by E-L, D&H and B&M to the protective conditions. They were discussed in the September 16 Report in a section entitled "PROTECTIVE CONDITIONS FOR D&H, E-L and B&M" (B-36 through B-44). We do not know where in that section of the Report one can find any

[43] See above at page 19.

review, much less a careful review, of the objections made by E-L, D&H and B&M.[44]

By far the most informative statement, which is not quoted in the majority opinion, is that (B-41):

> *"The three protected carriers, on petition, have raised valid issues as to interpretation, application, scope, and other aspects of the protection."*

The Commission's failure to make the required statutory findings in support of the Order of April 6, *as modified by the Order of September 16,* does not present a mere technical issue. As we will show, the Commission did not merely fail to meet, or even pass upon, the objections made by E-L, D&H and B&M that the original protective conditions were inadequate. The Commission left the protection of those three carriers very largely to determinations to be made after the consummation of the merger and, except as to the contention of the "unprotected carriers" based on Section 5(1) of the Interstate Commerce Act (B-38, B-39), the Commission gave no indication as to what it expected the ultimate determinations to be.

B. Such provision as was made by the Commission's Report and Order of September 16 for the protection of E-L, D&H and B&M is wholly inadequate.

In analyzing the effect of the Report and Order of September 16 it is logical to consider (1) what protection E-L will have under the present Appendix G traffic conditions

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[44] We find only the following in the September 16 Report:

"D&H, characterizing the conditions as unique and untested, expresses doubts as to their practicability, but joins with E-L and B&M in requesting various modifications of their terms" (B-37, B-38).

"E-L argues that the protective conditions are inadequate, and asks further hearing to consider the extensive changes it proposes" (B-38).

"B&M considers the indemnity concept of the prior report to be sound and correct but it also requests modification of the conditions in various ways, including protection from any diminution of its capital value" (B-38).

"The New Jersey PUC supports E-L's request for change in the base year for computing indemnity payments" (B-38).

One general argument made by E-L was rejected at pages B-40 and B-41.

unless and until they are modified following the further hearing, and (2) what protection E-L will have after any modification of the traffic conditions shall have become effective (assuming that any indemnification condition, if there be one, will become effective retroactively at the same time).

B(1). The period while the present traffic conditions are operative.

Until the present traffic conditions are modified and the date (to be specified) on which the modification is to become effective has been reached, E-L will have to depend for protection on the present traffic conditions if the Order below is sustained.

In E-L's petition for reconsideration and other relief of July 8, which is Exhibit E to E-L's complaint (R. 462-646), the portions of Appendix G which related *almost exclusively* to the traffic conditions were discussed at page 17 and in Appendices 1 and 2 to the petition, the two Appendices being 44 pages long. The definition of the "protective period" was considered at pages 9-17. The *force majeure* clause, section 4 of Appendix G, was dealt with at pages 33-36 of the petition. The interpretation and enforcement provisions, which for the most part apply to the traffic conditions, were discussed at pages 37-45.

It would be wholly unreasonable to expect this Court to study the large amount of material to which we have just referred. Nor do we wish to lengthen the text of this brief by pointing out some of the most serious defects in the traffic conditions.

We are including in Appendix E comments on the present traffic conditions which explain some of the most serious objections that E-L made to the Commission. Some of those objections relate to sections of Appendix G which apply to both the traffic conditions and the indemnification condition but, since the indemnification condition has been "rescinded", objections which relate only to the indemnification condition are not discussed in Appendix E.

The majority referred to the protective conditions, taken together, as "unprecedented in their severity in the history of railroad mergers" (A-10, A-11), and it referred to the traffic conditions as "highly favorable to the three protected carriers" (A-25, A-26). These characterizations were used without any analysis, or even any specific description, of the objections which the "protected carriers" had made to the conditions; as to such objections, the majority limited itself to the generalizations which are quoted above at page 23 and in footnote 28.

At page A-22 the majority opinion says:

> "We see no force in the point that the special traffic conditions will subsist pending further order; these conditions, designed to preserve the pre-merger *status quo*, can only help the protected roads * * *."

What this means is that E-L, D&H and B&M will be better off with the present traffic conditions until they are modified than they would be if there were no traffic conditions at all. That would be true if the present traffic conditions were only 20% effective in preserving the pre-merger *status quo*. It is beside the point.

The significant findings quoted above at page 18 and at page A-43 of the dissenting opinion are substantially to the effect that E-L, D&H and B&M should be effectively protected after the merger. The question is not whether they will be better off with defective traffic conditions than they would be if they had no traffic conditions at all. The question is whether they will have the protection which the Commission found that they should have.

E-L does not contend that the Commission's findings in the April 6 Report called for traffic conditions which would be 100% effective. But the findings certainly called for conditions that would not be seriously inadequate.

The duration of the period during which E-L, under the Court's Order below, would have to depend for protection on the present traffic conditions might be substantial. It would commence no later than the consummation of the merger.

No one can forecast when it would end, because of uncertainties as to

1. when any modified traffic conditions will become effective; and
2. when the protective period will end.

As to the ending of the protective period there are at present two uncertainties: first, as to the meaning of the words "final determination" in the first line of section 1 of Appendix G (327 I.C.C. at 561), in the absence of any definition of those words; and second, when there will be a "final determination" of E-L's petition for inclusion in the present N&W System in Finance Docket No. 21510 et al.[45] Whether or how these uncertainties will be cleared up as a result of the further hearing now in progress, and when the protective period will end, cannot be forecast.

Furthermore, the extent of E-L's injury as a result of deficiencies in the Appendix G traffic conditions cannot be measured by the dollar amount of the revenues diverted during the period the Appendix G conditions are in effect. Shippers who are weaned away by a merged Penn-Central may never return to E-L. In one of the affidavits submitted to the Court below E-L's President, Gregory W. Maxwell, said (p. 4; R. 947):

> "In my judgment, if the Penn-Central merger were carried out with only the protective conditions as adopted by the Commission in its Order of April 6, 1966, a substantial amount of traffic would be diverted by the merged company from E-L and never regained by E-L standing alone."

B(2). The period after the Commission's further order or orders shall have become effective.

We have already quoted what Judge Weinfeld said as to this period (A-59):

> "None can divine what modifications will be made in traffic conditions, or whether the indemnification

[45] See first and second lines of section 1 of Appendix G (327 I.C.C. at 561) and pages vi-vii of Appendix E to this brief. For present purposes we are assuming a "final determination" favorable to E-L.

requirement will be continued at all, or the nature, duration or scope of any revisions of or additions to either, both or any of the requirements enumerated in Appendix G."

The majority opinion refers to the Commission as "having initially prescribed a still more unusual indemnity as a back-stop in the unproved eventuality that the special traffic conditions should not prove fully effective, now wishes to reconsider the latter with a view to *strengthening* them in the light of the extensive suggestions by their beneficiaries***" (A-28, A-29).

This presupposes that a further hearing would result in a *strengthening* of the traffic conditions.

Extraordinarily enough, what we have quoted is preceded in the opinion by a sentence in which the majority indicated that the original Appendix G traffic conditions were adequate and went "far beyond anything in previous history", and it is followed by two sentences of which the second said that "a mere reading of their text is enough" to satisfy the reader that the Appendix G conditions are not ineffective. If the majority meant to imply that the Appendix G traffic conditions will be effective in the sense of being *adequate* to furnish the intended protection, why should the majority expect them to be strengthened? If not, what is the meaning of the majority's warm words of endorsement?

As to the indemnification condition, there appears to be no issue between the majority and the dissenting Judge below that it is uncertain whether an indemnification condition will be approved and made effective following the further hearing and, if one should be approved, what its terms will be. The majority opinion refers to the indemnification "as a back-stop in the unproved eventuality that the special traffic conditions should not prove fully effective" (A-28, A-29).[46] The Commission obviously thought, when

[46]We pass by the opinion's reference to "the *unproved* eventuality", as it may mean only that there has never been any experience with the traffic conditions, since the merger has not yet been consummated.

it issued the April 6 Report, that the "back-stop" was necessary. If E-L must depend upon what is provided in a further order or orders of the Commission, it is to be hoped that the Commission will conclude that a "back-stop" is necessary, and that it will not be so grossly defective as the indemnification condition which the Commission approved on April 6.[47] But how can anyone forecast what the result will be?

B(3). The contentions of the seven appellant "unprotected carriers" have increased the uncertainties which the Commission's Orders present.

As already stated, we will not undertake to answer in this brief the contentions of the seven "unprotected carriers" which are appellants. If any answer thereto appears necessary or desirable, it will be included in E-L's reply brief.

It should be said, however, that E-L has taken the position that neither of the protective conditions, nor both of them together, are prohibited by Section 5(1) of the Interstate Commerce Act (Appendix C, p. i-ii).

Nevertheless, the contentions of the unprotected carriers add to the uncertainties about the protection of E-L. As to whether the addition is serious, any comment will be deferred.

C. If the merger had been consummated as contemplated by the Order below, E-L could never have had an effective judicial review of the protective conditions.

E-L's point as to an effective judicial review applies both to the present Appendix G traffic conditions, which would be in effect for an unknown period of time, and such protective conditions as might be prescribed by the Commission in a further order or orders after the hearing provided for in the Report of September 16 (B-42 through

[47] See paragraphs 9(b)(1) and 9(b)(2) of E-L's complaint at pages 7-9 (R. 356-358).

B-44) and the Order of September 29 (C-1, C-2). However, our discussion will be directed primarily to the latter.

The initial position of Penn and Central was that if, after consummation of the merger, a reviewing Court determined that the protective conditions prescribed after the further hearing could not be sustained, the Court could order a "dissolution" of the merger. However, on the oral argument below none of the Judges appeared to consider a "dissolution" to be a practical possibility, and the two opinions reflect the views which were expressed by the Judges on the argument (A-35, A-60).[48]

During the oral argument counsel for E-L, the Commission and the Central, in response to questions from the Bench, all expressed the opinion that, in the contingency just referred to, the reviewing Court could not direct the Commission to adopt specified conditions and that its powers would be exhausted by a decision setting aside the Commission's order or orders in whole or in part and remanding to the Commission.

The views expressed by counsel as to the limitations on the powers of a reviewing Court are clearly supported by this Court's decision in *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17 (1952). There the Federal Power Commission had authorized a hydroelectric project upon a prescribed condition that the licensee permit the interconnection of certain United States government transmission facilities. On judicial review the Court of Appeals for the District of Columbia Circuit entered an order purporting to modify the Commission's Order by striking the condition. This Court said (at p. 20-21, footnote omitted):

> "When the court decided that the license should issue without the conditions, it usurped an administrative function. There doubtless may be situations where the provision excised from the administrative order is sep-

[48] Compare *Federal Trade Commission* v. *Dean Foods Co.*, 384 U. S. 597 (1966) at 605 and also footnote 5 at 607.

arable from the remaining parts or so minor as to make remand inappropriate. But the guiding principle, violated here, is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration. See *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37.

"The Court, it is true, has power 'to affirm, modify, or set aside' the order of the Commission 'in whole or in part.' § 313 (b). But that authority is not power to exercise an essentially administrative function. See *Ford Motor Co.* v. *Labor Board*, 305 U.S. 364, 373-374; *Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608. The nature of the determination is emphasized by § 10 (a) which specifies that the project adopted 'shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan . . . for the improvement and utilization of water-power development, and for other beneficial public uses.' Whether that objective may be achieved if the contested conditions are stricken from the order is an administrative, not a judicial, decision."

See also *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) at p. 141-146 and *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475 (1942) at p. 489-490.

Judge Weinfeld's dissenting opinion stated the applicable rule correctly and succinctly (A-59, A-60).

The majority opinion devoted several pages to this subject. It first pointed out that Penn and Central had waived any right which the merged company might have had to appeal from a further order or orders of the Commission relating to the protective conditions, as distinguished from any provision for capital loss indemnification (A-33, A-34). However, the "unprotected carriers" would have a right to a judicial review of any further order relating to the protective conditions, and none of them has waived any right to such a review.

The majority then proceeded to a discussion of what power the reviewing Court would have upon an appeal by one of the protected carriers (A-35 through A-37), concluding as follows:

> "If we should consider the new conditions so inadequate for the protected carriers or injurious to others as to violate the law, an eventuality which because of the technical nature of the subject-matter is by no means likely, we are confident we could inform the Commission in a way it would thoroughly understand. During the pendency of review of revised conditions and such a possible remand, new conditions for the benefit of the protected roads would remain in effect except as we otherwise ordered. To suggest that, after all the Commission has said, its new conditions will so far depart from its professions as to imperil the survival of the three carriers during the pendency of review would be an unwarranted reflection on either the Commission's good faith or its competence."

Referring to this portion of the majority opinion, Judge Weinfeld said that the majority appeared to rely on "a gentle nudging of the Commission" (A-60).

It may also be observed that the majority indicated quite clearly that:

1. To suggest that the new conditions may be inadequate would be an "unwarranted reflection on either the Commission's good faith or its competence". The implication is that a right to an effective judicial review would not be of any consequence.

2. If there were a review, the new conditions for the benefit of the protected roads would remain in effect, during the pendency of the review and any possible remand, except as the reviewing Court otherwise ordered. (What would be the practical result if the new conditions were in fact inadequate?)

3. A decision that the new conditions are inadequate is "an eventuality which because of the technical nature of the subject-matter is by no means likely".

In other words, the Commission's expertise would be dispositive. (This can be contrasted with the sentence on page A-29 which indicates that the majority of the Court had made up its mind about the Appendix G traffic conditions after a "mere reading of their text".)

4. In the event, which was evidently considered highly remote, that the reviewing Court concluded that the appellant was entitled to relief because of the inadequacy of the protective conditions, the Court "could inform the Commission in a way it would thoroughly understand". (Surely this means that the Court would at least go very close to doing what this Court said in *Federal Power Commission* v. *Idaho Power Co.* should not be done.)

The inference which can reasonably be drawn from these pages of the majority opinion, and which is not dispelled by anything in other pages, is that the majority does not consider an effective judicial review of a Commission order to be important in such a case as this.

D. It is not consistent with the Interstate Commerce Act and the Administrative Procedure Act to have the merger consummated and the protective conditions determined upon subsequently.

In considering whether or not the course which the Commission followed with respect to the protective conditions, and which the Court below approved, was authorized by or consistent with the Interstate Commerce Act and the Administrative Procedure Act, it is fitting to consider all of the provisions of those two Acts which are quoted above at pages 8-10.

E-L does not contend that any of those provisions, taken by itself, explicitly prohibits the course which the Commission followed. It does contend that, taken together, they set forth a statutory scheme and that the Commission's course has been inconsistent with that scheme.

D(1). The importance, novelty and complexity of the protective conditions.

The only provision of the Acts to which we have referred that mentions "conditions" is Section 5(2)(b) of the Interstate Commerce Act; it authorizes the approval of a merger "subject to such terms and conditions and such modifications as [the Commission] shall find to be just and reasonable". There is no explicit provision in Section 5(2)(b) or elsewhere that it makes any difference, procedurally or substantively, how important, novel or complex "conditions", or "modifications" of conditions, may be. However, we do not suppose that any of the appellees will go so far as to argue that the Commission may "permit consummation of a merger upon a general finding that a proposed merger is in the public interest, subject to terms and conditions to be reserved for future determination" (see A-52).

The Commission's explicit findings, quoted at page 18 above, make it superfluous to stress the importance of the protective conditions.

Nor can it be seriously disputed that the protective conditions which the Commission adopted on April 6 were novel. The Commission called them "unique" in the Report of September 16 (B-14). In the memorandum submitted by the Commission's General Counsel to this Court in response to the applications for a stay, the Commission's General Counsel referred to "unprecedented protective conditions" (p. 3-4) and "the unprecedented traffic conditions of Appendix G" (p. 8).[49]

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[49] It is true that in the Report of September 16 the Commission, after having stressed the importance of the "unique" conditions (B-14), later said that "their novelty is more apparent than real" (B-39). This comment was followed by references to conditions of other kinds, which are discussed below at pages 58-59.

As to the complexity of the conditions, only the majority below appears to have thought that they were simple, and it seems to have had that thought only intermittently.

This Court can reach its own conclusions from the following:

> If the fashioning of adequate protective conditions were not intrinsically difficult, the Commission could certainly have made any necessary changes in the Appendix G conditions between July 8, when E-L's petition was filed, and September 8, when E-L started its action.
>
> When the Commission decided upon its Report and Order of September 16, it merely made the statements quoted above at page 27 and took the action set forth at pages 27-28.

D(2). The present traffic conditions will remain in effect for an indeterminate period of time and the Commission's Orders of September 16 and September 29 do not contemplate that any of their defects will be cured retroactively.

As to such traffic conditions, E-L has never had a hearing, and the objections to them made in its petition for reconsideration of July 8 have not been passed upon.

It is hardly necessary to repeat that, while the Commission provided for a further hearing as to the traffic conditions, any modifications thereof will be effective "as of the date prescribed in a modification order" (B-44). This means that, as to the original Appendix G traffic conditions, E-L will never have had a hearing, an opportunity to offer evidence, or any of the other procedural protections contemplated by Section 5(2)(b) of the Interstate Commerce Act and Sections 5(a), 5(b), 7(c), 8(b) and 10(e) of the Administrative Procedure Act (see above, p. 8-10).

Some of the more serious objections to the original Appendix G traffic conditions are summarized in Appendix E hereto.

We have referred at page 42 to the extraordinary statement at page A-22 of the majority opinion that the continuance of the Appendix G traffic conditions pending their modification "can only help the protected roads"—a strikingly irrelevant comment on the issue whether, after the merger, E-L, D&H and B&M will have *adequate* protection.

There is nothing in the September 16 Report remotely approaching a finding by the Commission that the present Appendix G traffic conditions are or will be adequate. What the Commission said as to the "valid issues as to interpretation, application, scope, and other aspects of the protection" (B-41), and the Commission's provision for a further hearing with a view to modification of the Appendix G traffic conditions, establish that the Commission was impressed by the contentions of E-L, D&H and B&M that the Appendix G traffic conditions were not adequate.

In any event, it cannot be disputed that E-L has never had a hearing with respect to the Appendix G traffic conditions.

Further, it is extraordinary indeed that the Commission did not undertake to pass on *any* of the objections to the Appendix G traffic conditions which E-L made in its petition of July 8. Granted that some of those objections related to complicated matters, that is by no means true of all. Several related to defects of the traffic conditions which the Commission could have passed upon readily before E-L commenced its action on September 8 (see Appendix E hereto at p. vii, ix, xi-xiv), and the Commission's Report on Reconsideration was not decided upon until 8 days later.

The detriment to E-L in having the present traffic conditions remain in effect after the merger is obvious. The Commission's provision that any indemnification condition which may be adopted after the further hearing shall be

retroactive to the date of consummation of the merger may reasonably be looked upon as a virtual acknowledgment of the need for protection in addition to the Appendix G traffic conditions while the latter are in effect, even though it affords no assurance of an adequate retroactive indemnification condition.

D(3). The provision for a post-merger hearing relating to (1) possible modification of the Appendix G traffic conditions and (2) the indemnification period cannot realistically be considered equivalent to a pre-merger hearing, findings and decision.

The majority's opinion says (A-22):

> "The claim of lack of hearing with respect to the protective conditions is shattered by the Commission's report on reconsideration."

This presupposes that there is no significant difference between a pre-merger hearing with findings and an opportunity for judicial review before consummation of the merger, on the one hand, and a post-merger hearing and what may follow such a hearing, on the other hand.

There are two marked differences.

First, as already noted, neither the post-merger hearing nor any modification of the traffic conditions the Commission may decide upon will affect the operation of the Appendix G traffic conditions until the modification becomes effective. It is no answer to say that the Commission may adopt an indemnification condition which will be retroactive to the date of the merger and will make up for the deficiencies in the Appendix G traffic conditions. There is nothing remotely approaching an assurance that it will do so.

Second, there is all the difference in the world between a judicial review prior to the consummation of a merger

and a judicial review after consummation of a merger. If the review takes place before the merger is consummated, the Courts can compel compliance with the applicable provisions of the Interstate Commerce Act and the Administrative Procedure Act by enjoining consummation until they are complied with. After the merger has been consummated, the reviewing Courts' powers, and the effects of any exercise of power, will be very different indeed (see above, p. 45-49).

D(4). The Commission did not even make a finding in its Report of September 16 that after a post-merger hearing it could fashion "just and reasonable" conditions, including just and reasonable "modifications" of the traffic conditions, which would accomplish the stated objectives of the original Appendix G protective conditions.

The original Appendix G conditions were "imposed to obviate impairment or serious weakening of E-L, D&H or B&M, or the rendering of them individually or collectively substantially less capable of providing service to their shippers and connections" (327 I.C.C. at 532). The majority opinion referred to the finding which we have just quoted as one of the "vital findings from which we would not allow the Commission to depart, at least without complete explanation" (A-24, A-25).[50]

It seems to us unnecessary to argue whether or not the Commission's Report of September 16 contains an implicit finding to the effect referred to in the above sub-heading. What is most significant, so far as the protected carriers are concerned, is that there is no analysis in the September 16 Report of the objections of the protected carriers to the Appendix G conditions; no significant analysis of the contentions of the unprotected carriers, except as to the

[50] See note 23 at page 18.

contentions based on Section 5(1) of the Interstate Commerce Act; and no intimation as to what may be expected to be the result of the hearing which commenced on October 31.

D(5). The applicable statutes do not permit the Commission to authorize the consummation of a merger, while deferring to a post-merger hearing the determination of terms and conditions of the merger which the Commission itself has found to be necessary to support the merger as in the public interest.

The proposition stated in the above sub-heading is taken largely verbatim from Judge Weinfeld's dissenting opinion (A-52).

It is of cardinal importance that the Commission found in its April 6 Report, in substance, that (1) the service rendered by the protected carriers to "their shippers is essential and the public interest dictates that it be preserved"; (2) unless somehow protected, they "would be adversely affected by the proposed merger to a serious degree and would be severely handicapped in providing required transportation to the highly industrialized areas they serve"; (3) an immediate consummation of the merger is consistent with the public interest "if conditions are imposed to obviate impairment or serious weakening of E-L, D&H or B&M, or the rendering of them individually or collectively substantially less capable of providing service to their shippers and connections"; and (4) "unless they are protected during the period necessary to determine their future, we would not authorize consummation at this time, even though approving the merger" (see above, p. 18).

It has never been disputed that these findings were amply supported by the record before the Commission.

Nor is it contended that the September 16 Report in any way modified the findings as to the essentiality of the

service rendered by E-L, D&H and B&M; the adverse effects upon them and upon their ability to provide the required transportation service after a Penn-Central merger, absent adequate protective conditions; and the necessity for adequate protective conditions.

In support of the proposition stated in the above subheading, and E-L's contention that it was deprived of procedural due process of law to which it was entitled under the Fifth Amendment to the United States Constitution, E-L cited the following decisions in its Jurisdictional Statement:

Morgan v. *United States,* 304 U.S. 1 at 18-19 (1938)

Hill v. *Federal Power Commission,* 335 F. 2d 355 at 363 (5th Cir. 1964)

Chicago, Burlington & Quincy R.R. Co. v. *United States,* 242 F. Supp. 414 at 417 (N.D. Ill. 1965), aff'd 382 U.S. 422 (1966)

E-L also quoted from *Morgan* v. *United States,* 304 U.S. at 18-19:

> "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and *to be heard* upon its proposals *before* it issues its final command."

It is not suggested that the cases just cited are directly in point, in the sense that the decision of the Court below was clearly in flat conflict with them. They are helpful, rather, because they illuminate the broad principles which this Court has applied.

Judge Weinfeld said in his dissenting opinion (A-52):

> "The procedure of interim authorization here adopted by the Commission, carried to its logical conclusion, would permit consummation of a merger upon a general finding that a proposed merger is in the

public interest, subject to terms and conditions to be reserved for future determination."

The majority said, in answer to the dissent (A-25, A-26):

> "To be sure, what we have said would in no way cover the hypothetical case, suggested in the dissent but unlikely to be encountered in life, where the Commission approved a merger and left all conditions subject to further consideration. But to analogize such a case to this one, with page after page of carefully considered conditions of every sort, special traffic conditions highly favorable to the three protected carriers, and an assurance that in addition financial conditions of one or both types will be speedily imposed if found necessary on reconsideration, would be to ignore all that Mr. Justice Holmes taught us on the score of differences of degree. See Noble State Bank v. Haskell, 219 U.S. 104, 112 (1911); LeRoy Fibre Co. v. Chicago, M.&St. P. Ry., 232 U.S. 340, 354 (1914) (concurring opinion)."

We do not suppose that Judge Weinfeld meant that the majority's decision would necessarily have to be "carried to its logical conclusion" in other cases.

We are truly astounded by what we have quoted from the majority opinion.

What is meant by the words "page after page of carefully considered conditions of every sort"? Was the Court referring to the 15 conditions in Appendix A (327 I.C.C. 551-555)? In deciding the issues which relate to the protective conditions in Appendix G, what difference does it make whether or not the conditions in Appendix A consume "page after page" or were "carefully considered"?

The reference to "special traffic conditions highly favorable to the three protected carriers" was not justified (see pages 42-43 and Appendix E hereto).

Do not the qualifying words, *"if found necessary on reconsideration"*, as used in connection with the possible

imposition of "financial conditions", simply emphasize Judge Weinfeld's view that the Commission approved consummation of the merger "subject to terms and conditions to be reserved for future determination"?

If Section 5(2)(b) were to be construed literally, there would be a stronger argument for the proposition that all terms and conditions, and all modifications of terms and conditions, have to be determined and found to be "just and reasonable" before a merger is consummated, than for the proposition that the determination of terms and conditions or modifications thereof, and findings relating thereto, can normally be deferred until after a merger is consummated.

It is submitted that there is no need to go to one extreme or the other, and that Section 5(2)(b) must be read in conjunction with the provisions of the Administrative Procedure Act which have been quoted above at pages 8-10.

The Commission itself seems to recognize that its powers under Section 5(2)(b) are not unlimited. The Commission's response in this Court to the applications for a stay stated (p. 7-8):

> "* * * that the Commission's power to reserve the issue of such protective conditions for further hearing and determination is indistinguishable from its power (not questioned by the railroad appellants) to condition its approval of a rail merger upon the applicants' acceptance of the Commission's reservation of power to require inclusion of other railroads at a later date."

We do not agree that any instance of the imposition by the Commission of conditions relating to the inclusion of other railroads is a precedent for the course which the Commission has followed with respect to the protective conditions in this case.

In the first place, we know of no instance in which the Commission has made findings with respect to the necessity

of the inclusion of a railroad or railroads similar to those which it made in this case with respect to the protection of E-L, D&H and B&M, but has reserved for future determination the terms and conditions of the inclusion.[50a]

Secondly, we know of no case in which a condition relating to the inclusion of another railroad after consummation of a merger has not been accepted by the merging railroads or has been contested in Court by the railroad whose inclusion was involved.

We are uncertain whether what the Commission said at pages B-39 and B-40 of the September 16 Report, in the paragraph in which it cited *Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455, 492, was intended to imply that the Appendix G protective conditions were similar to, or merely a modest extension of, the so-called "standard" gateway and traffic conditions imposed by the Commission in the cited proceeding and in many subsequent proceedings. The "standard" conditions are to be found, in their latest version, in Appendix I to the April 6 Report (327 I.C.C. at 564-565). The protective conditions in Appendix G (and the related portion of the April 6 Report) are very different indeed, even though they relate to the same general subject, i.e. traffic. Furthermore, we know of no instance in which the

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[50a] It may be asserted that this very case is an instance.

The Commission's Report found (327 I.C.C. at 526-527):

"Accordingly, we find that inclusion of New Haven's freight and passenger operations in this transaction will be consistent with the public interest, and our approval of the merger is conditioned upon such inclusion."

Actually the Commission's approval of the merger was not "conditioned upon such inclusion"—it was conditioned upon the acceptance by the applicants of a condition which *may* result in such inclusion (327 I.C.C. at 553; section 8 of Appendix A).

However, the Commission's Report shows that it understood that the inclusion of the New Haven was by no means assured (327 I.C.C. at 525, lines 6 through 10; 327 I.C.C. at 527, first full paragraph).

Commission has undertaken to approve a merger, and deferred its determination of the text of "standard" traffic conditions until after the merger has been consummated.

This Court is, of course, familiar with conditions imposed by the Commission for the protection of employees. Cf. *Brotherhood of Maintenance of Way Employes v. United States*, 366 U.S. 169 (1961). We know of no instance in which the Commission has undertaken to defer its decision as to the terms of employee protection until the conclusion of a post-merger hearing.

The need for realistic limitations on the Commission's power under Section 5(2)(b) to defer its determination of just and reasonable terms and conditions of a merger can be illustrated by considering the accommodation of Section 5(2)(b) and the policy of the antitrust laws, a subject with which this Court is especially familar. *Seaboard Air Line R.R. Co. v. United States*, 382 U. S. 154 (1965). In the Motion to Affirm of the appellees Seaboard Air Line Railroad Company *et al.*, recently filed in this Court in Nos. 638, 639 and 641 (October Term) on the appeal from the second decision of the three-Judge Court, the appellees argue that the Commission made a proper accommodation because it provided for two healthy, "balanced competitive [rail] systems in the Southeast" (the merged Seaboard Coast Line and the Southern) and because it prescribed specific conditions to achieve that goal and to help smaller carriers in the territory.

Appendix A to the Motion to Affirm, a reprint of Appendix XI to the Commission's Report (320 I.C.C. at 267-269), contains 14 conditions. Nos. 1 through 6 are "standard" gateway and traffic conditions. Nos. 8, 9, 10 and 11 are specific special conditions for the benefit of Southern, and No. 12 is a condition for the benefit of Central of Georgia, a subsidiary of Southern. No. 7 is a special condition for the

benefit of Norfolk Southern Railway Company. No. 14 is a condition relating to the future inclusion of other carriers, similar to paragraph 1 of Appendix O in the Norfolk and Western merger case (see above, p. 14, footnote 14). No. 13 is a general provision relating to applications for modifications, the reservation of jurisdiction, etc.

The significant thing, for the purposes of this case, is that, if the course followed by the Commission in this case was permissible in the Seaboard-Coast Line merger proceedings, the Commission could have simply said: "We find a merger of the two applicants to be in the public interest, subject to such just and reasonable terms and conditions as, after hearings subsequent to the consummation of the merger, we shall find to be necessary or proper in order to bring about the required accommodation with the policy of the antitrust laws; and consummation of the merger by the applicants shall constitute an irrevocable assent to such terms and conditions".

If that course would have been permissible and had been followed, undoubtedly the merged Seaboard Coast Line would be operating by now.

Important as an accommodation with the antitrust laws may be, it cannot be more important than the *first* of the four considerations to which, among others, the Commission is expressly required to give weight under Section 5(2)(c): "The effect of the proposed transaction upon adequate transportation service to the public".

No valid precedents have been cited in support of what the Commission did, with respect to the protective conditions, in this case. The absence of precedents is understandable in the light of the provisions of the applicable Sections of the Interstate Commerce Act and the Administrative Procedure Act.

POINT II.

The reasons which the Commission gave in its Report of September 16 for a prompt consummation of the merger wholly fail to support its conclusion.

In addition to the Commission's plainly erroneous reliance upon its provision in the April 6 Report for the original Appendix G conditions, three additional important reasons which the Commission gave for a prompt consummation of the merger were clearly untenable and the Commission's findings relating to them were arbitrary and capricious.

While the Commission's errors with respect to all three were pointed out to the three-Judge Court, the majority opinion does not mention two of the three and, while agreeing that there was an error with respect to the third, the majority was apparently uninfluenced by that error.

As has been noted at pages 15-17 above, the application of Penn and Central to merge was filed in 1962, at a time when they appeared to be in dire straits, but the earnings of each of the two railroads improved so spectacularly in every one of the years 1962-1965 that *there was clearly no urgency about their merger when the Commission issued its April 6 Report.* And since they continued in 1966 to do even better than in 1965, there was no urgency about the consummation of the merger when the Report of September 16 was issued.

On the other hand, the proposed merger represented a serious, if not mortal, threat to E-L, D&H and B&M and to their ability to provide for "required transportation to the highly industrialized areas they serve".

In an effort to permit the Penn-Central merger to be consummated and at the same time provide adequate protection to E-L, D&H and B&M, the Commission fashioned

the protective conditions which were incorporated in Appendix G and the related portions of the Report. The Commission's effort was not successful. The Commission itself must have concluded that it was not; otherwise it would not have said and done what it said and did by the September 16 Report. [51]

In the section of the September 16 Report at pages B-13 through B-16, entitled "TIME OF CONSUMMATION", the Commission undertook to set forth its reasons for what it called "prompt consummation of the merger" and in that connection to comply with the provision of Section 8(b) of the Administrative Procedure Act which is quoted at page 9 above.

In both the first paragraph and the last paragraph of the section entitled "TIME OF CONSUMMATION" the Commission said that the reasons stated in that section were the basis of its conclusion in favor of a prompt consummation (B-13, B-16).

A. The choice before the Commission was not between a deferment of "several years" or immediate consummation.

The Commission's discussion in the September 16 Report of the time of consummation reads as if the only choice was between a deferment of "several years" and immediate consummation of the merger—and when the September 16 Report was issued the effective date of the Commission's Order of April 6 was September 30.

In two places in the section of the September 16 Report the Commission spoke of a deferment of "several years".[52] In two places it used the word "indefinitely" as if it denoted a period which would probably last several years.[53]

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[51] See above at pages 27-28, 38-40.

[52] B-15, lines 7 and 8, and the second line of the last paragraph.

[53] B-13, line 3; B-15, last paragraph, second line.

The section on "TIME OF CONSUMMATION" thus gives the incorrect impression throughout that the Commission's only choice was between "prompt consummation" and a deferment of "several years".[54]

The question before the Commission was whether to have a hearing, and make such revisions of the Appendix G protective conditions as were found to be required, prior to the consummation of the merger. The Commission decided instead to authorize immediate consummation and order a post-merger hearing[55] with respect to the protective conditions, leaving the Appendix G traffic conditions in effect on an interim basis and rescinding the indemnification condition. That decision was obviously of great importance.

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[54] As a preface to, and presumed support for, its references to "several years", the Commission said that it had "particularly considered the contention of E-L and D&H that consummation should be deferred until their inclusion in a major rail system is accomplished or assured" (B-13, lines 4-7). It is quite true that E-L's petition of July 8, 1966 contained such a prayer for relief, but it was immediately followed by an alternative prayer that the Commission enter an order or orders (Exhibit E to complaint, p. 112; R. 578):

> "Modifying the Order of April 6, 1966 so as to defer approval of the merger of The New York Central Railroad Company into The Pennsylvania Railroad Company and to provide that a further hearing shall be held, to start either on a date to be specified in the order or on such date as the Commission may later fix;"

No explanation was given in the September 16 Report of the Commission's reasons for not granting this prayer.

[55] The Commission's Report and Order of September 16 contemplated that Penn and Central would be free to merge on or after September 30, and the date of the hearing, to which we have referred as the post-merger hearing, was not fixed until the Order of September 29, released September 30 (C-1, C-2).

Of course, the temporary restraining order issued by the three-Judge Court and the stay under this Court's Order of October 18 prevented the merger from being consummated until after the commencement of the further hearing on October 31.

B. The Commission's statement in the section of the September 16 Report entitled "TIME OF CONSUMMATION" that one of two "major steps" it had taken was the imposition of the Appendix G protective conditions was incongruous, because the September 16 Report almost completely eliminated those conditions.

It will be recalled that in the Commission's statement of its reasons for the prompt consummation of the merger it said that, recognizing the competitive impact of the merger on E-L, D&H and B&M, it had taken "two major steps", of which one was the imposition of the Appendix G protective conditions (B-14; see above, p. 36). What the Commission said was incongruous, because later in the same Report the Commission substantially eliminated the Appendix G conditions except for the interim continuance of the traffic conditions (B-43 through B-45).

C. The Commission's finding that the Penn and Central are in a "vulnerable and highly sensitive financial situation" was in conspicuous conflict with the facts, arbitrary and capricious.

In discussing the reasons for a prompt consummation of the merger the Commission referred in the Report of September 16 (B-13) to "the applicants' financial situation during the past decade and the fact that they, like the rest of American industry, are not assured of continuous operations at the 1966 level." Earlier in the same Report it had repeated a summary from the Report of April 6 in which it had referred to the applicants' "vulnerable and highly sensitive financial situation" (B-9). Taken together these two statements in the Report of September 16 can only mean that as of that date the Commission found the applicants' *"vulnerable and highly sensitive financial situation"* to be

one of the reasons for a prompt consummation of the merger.[56]

It is difficult to imagine a more extraordinary finding. Some of the pertinent facts are as follows:

> In 1965 the combined consolidated net income of the two companies and their consolidated subsidiaries was $122,469,097.[57]
>
> In 1961, the last calendar year preceding the filing of the merger application, the combined consolidated net income of the Penn and its consolidated subsidiaries and the Central and its consolidated subsidiaries was only $4,745,002.

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[56] In the Response filed on behalf of Penn and Central to the applications for a stay, E-L's argument, with respect to the reasons given by the Commission for its conclusion that a prompt consummation of the merger was desirable, was asserted to be "based on gross mischaracterizations" (p. 14). This assertion apparently related to all of E-L's arguments about the Commission's reasons, including the argument on the subject referred to in the above sub-heading and the arguments on the subjects referred to in the next two sub-headings. We have carefully reviewed what was said in E-L's argument in its application for a stay on those subjects, and have found no reason to make any substantial change in those arguments.

As to the Commission's reference to the applicants' "vulnerable and highly sensitive financial situation", Penn and Central argued that those words were used in a quotation from the Commission's Report of April 6 that was reproduced in a section of its Report of September 16 (B-9) "in which it discussed attacks made not on the timing but on the basic merits of the merger". E-L's application for a stay pointed out (p. 10-11) that the words "vulnerable and highly sensitive financial situation" did not appear in the section entitled "TIME OF CONSUMMATION" but appeared at page B-9, just as that fact has been pointed out in this brief. Nevertheless in the section entitled "TIME OF CONSUMMATION" the Commission referred specifically to "the applicants' financial situation during the past decade" (B-13); this reference, which Penn and Central did not mention, can certainly be read in conjunction with what the Commission said at page B-9.

The Commission certainly must have considered the applicants' supposed "vulnerable and highly sensitive financial situation" relevant as to the timing of the merger, and the fact that it did is supported by its reference to "the applicants' financial situation during the past decade" (B-13).

[57] All of the figures given or referred to in this Point are either in, or are computed from, Reports on file with the Commission and are part of the record.

There was a substantial increase in the earnings in *each* of the years 1962 through 1965—that is to say, in the consolidated net income of the Penn and in the consolidated net income of the Central in each year.

The upward spirals of the earnings per share are shown later in another connection (p. 73).

As stated at page 73, Penn's net income for the first 6 months of 1966 was 32.61% more than for the first 6 months of 1965 and Central's was 80.12% more.[58]

Immediately before speaking of the "vulnerable and highly sensitive financial situation" of Penn and Central, the April 6 Report referred to the C&O-B&O unification and the merger of "N&W-Nickel Plate, et cetera" (327 I.C.C. at 519). The Commission considered it to be too early "to fully assess the effects those transactions have upon PRR and NYC", although the later of the two was consummated on October 16, 1964. It was in the light of those earlier unifications, the effects of which the Commission could not "fully assess", and the applicants' "vulnerable and highly sensitive financial situation" that the Commission reiterated in its Report of September 16 its finding that the "applicants, if required to continue as independent lines, could not keep pace with their common carrier obligations" (B-9).

Yet, despite the creation of the C&O-B&O System and the enlarged N&W System, each of the applicants has increased its income (whether on a "company" basis or a "consolidated" basis) dramatically year-by-year. And each did better in the first six months of 1966 than in the first six months of 1965.

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[58] These are not on a consolidated basis. The Central does not release consolidated figures for portions of a year and the Reports which have to be filed with the Commission during the year do not contain consolidated figures.

E-L does *not* contend that Penn and Central should not be permitted to merge because they have done so splendidly without merger.

E-L does contend that the financial situation of Penn and Central was decidedly relevant in considering whether it was in the public interest to have a "prompt consummation of the merger"—that is, a merger under an order having a September 30 effective date—without providing adequate protection for E-L, D&H and B&M.

E-L further contends that the Commission's finding as to the "vulnerable and highly sensitive financial situation" of the applicants is in conspicuous conflict with the facts, arbitrary and capricious, and that the Court below should have so held.

All of the foregoing was called to the attention of the three-Judge Court and E-L explicitly contended that the Commission's finding could not be sustained for the reasons above set forth. Yet the only reference in the majority opinion below to the extraordinary record of Penn and Central over a period of more than five years is an oblique one at page A-19, where there is a sentence which merely mentions (and treats as without significance) "the marked recent improvement in the applicants' earnings".

D. The Commission erred in concluding that any delay in the consummation of the merger would imperil or seriously delay the New Haven's inclusion in the Penn-Central System.

All of the Judges of the three-Judge Court apparently were in agreement that the Commission was in error, but the majority did not consider to what extent the Commission's error had influenced its conclusion that there should be a prompt consummation of the merger.

One of the reasons which the Commission emphasized in its Report of September 16 for "prompt consummation of the proposed merger" was its erroneous belief that a delay

in the Penn-Central merger would imperil the eventual inclusion of the New Haven in the Penn-Central System.

A supposition that a delay in the consummation of the Penn-Central merger would prejudice a solution of the New Haven's problems was undoubtedly the principal reason why three New England States and New York opposed the granting of an interlocutory injunction.

The Commission said at pages B-15 and B-16:

> "Inclusion of New Haven's vital passenger and freight operations in the merged company, as we have provided, is the only solution which has been proposed for continuance of that bankrupt carrier's operations. Although the applicants have agreed to such inclusion, we cannot predict the date upon which such actual inclusion will occur.
>
> * * * *
>
> "Absent the applicants' merger we see no solution to the New Haven problem. Certainly, neither of the applicants separately can be required to take over New Haven's deficit-ridden operations. We are not prepared to take this risk involved in a substantial postponement of consummation of the merger. *Moreover, we are not prepared to take the risks which delay of consummation of even six or twelve months might entail in providing a solution of the New Haven problem other than liquidation.*"

The Commssion's belief that a delay for even six months would imperil the New Haven's inclusion in the Penn-Central System was a direct result of its failure to obtain more information than it had. In E-L's petition for reconsideration and other relief of July 8, a copy of which is Exhibit E to E-L's complaint (R. 462-646), E-L discussed the New Haven in considerable detail (p. 81-92; R. 547-558). The reason for the discussion was that, if delay in

the consummation of the Penn-Central merger would imperil the ultimate inclusion of the New Haven in the Penn-Central System, that might be urged as a basis for a denial of E-L's petition.[59]

The last paragraph of the Point relating to the New Haven in E-L's petition of July 8 therefore read as follows (p. 92; R. 558):

> "The uncertainties about the New Haven constitute a strong additional reason why the consummation of the Penn-Central merger should be deferred until the Commission is better informed than it is now; can exercise its judgment in the light of fuller information; and can make more informative findings than it was able to make on April 6, 1966, or can make now."[60]

E-L's suggestion was not accepted, and the Commission's comments about "the risks" of a delay "of even six or twelve months" (B-16) are attributable to its inadequate information.

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[59] The situation was complicated because of E-L's inability to find out about (1) the procedure which the New Haven Trustees proposed to follow in order to effectuate a plan of reorganization under § 77 of the Bankruptcy Act and (2) any agreement, or negotiations toward an agreement, consistent with section 8 of Appendix A to the Report of April 6 (327 I.C.C. at 553). Hence E-L's petition of July 8 contained something in the nature of an exploration of the New Haven situation in the light of the requirements of § 77 of the Bankruptcy Act rather than a positive showing that a reasonable delay of the Penn-Central merger would not complicate the New Haven's problems.

[60] The Commission treated what E-L had to say in its petition of July 8 as a demand that the Penn-Central merger be delayed "in order to *settle*" the procedural questions raised by E-L or others (B-25 through B-27). As will appear from the quotation just given, E-L did not ask that anything be *settled;* it merely asked that the Commission learn more about the subject before reaching a conclusion which might affect E-L adversely and seriously.

However, as a result of the material which was submitted to the three-Judge Court and what was said on the oral argument on September 21—including answers to questions put by members of the Court—there was unanimity in the Court below that the granting of the motion for an interlocutory injunction would not imperil or even seriously delay the New Haven's inclusion in the Penn-Central System when formed.

This subject is discussed in the majority opinion at pages A-20 to A-22. We quote from page A-21:

> "If a temporary injunction would imperil or even seriously delay NH's inclusion, this would indeed weigh most heavily against it. *We find no likelihood of a delay.*"

Judge Weinfeld's dissenting opinion contains the following paragraph (A-62, A-63):

> "The dire consequences foreseen by some for the bankrupt New Haven hardly finds support in the facts. The estimates of time required for negotiations among the various parties and necessary activities to conclude statutory approval by both the Commission and the reorganization court extend up to a two-year period. As New Haven representatives candidly conceded upon argument, there is no reason why these activities cannot run apace while the Commission reconsiders and finally determines the protective requirements issues."

When deciding in favor of "prompt consummation" of the merger, the Commission clearly gave substantial weight to an erroneous belief or supposition relating to the New Haven. Yet, although the three-Judge Court unanimously found that the Commission's belief or supposition was erroneous, the majority gave no weight to the Commission's plain error.

E. The Commission erred in giving weight to the possibility that changes in conditions would make the stock ratio provided for in the merger plan unfair and thus block the merger.

The majority of the three-Judge Court should have taken the Commission's error into account.

One of the reasons given by the Commission in the Report of September 16 for a prompt consummation of the merger was as follows (B-15):

> "If consummation of the applicants' merger is deferred several years or indefinitely, we can have no assurance that it will ever occur. The factors that enter into an agreement to merge sooner or later can be affected by changing conditions."

As has already been noted, the Commission was not concerned with any deferment for "several years", and any disadvantages or dangers of an "indefinite" postponement obviously depended upon how long it would be.

It hardly seems permissible to suppose that the Commission was merely stating an irrelevant truism—that if a delay is long enough it may eventually thwart a merger. It seems more sensible to assume that, when the Commission referred to the "factors that enter into an agreement to merge", it was adopting the following argument which was made by the New Haven Trustees in their reply of July 29, 1966 to the petitions for reconsideration (p. 1-2):

> "* * * any indefinite or prolonged stay threatens the merger itself for the reason that no merger plan, and specifically one involving an exchange ratio, can indefinitely reflect the relative values of the separate companies being merged."

Upon the argument before the three-Judge Court counsel for the New Haven Trustees became more specific, saying (R. 2881-2882):

> "* * * This case now has been four years with a stock ratio of 1.3 to 1, that is 1.3 shares of Penn stock for 1 share of Central stock, that very simple ratio remaining without attack by the whole myriad of

stockholders of those two companies. *The circumstances haven't changed.* They can change tomorrow in either way, for better or worse, which affects the ratio."

We know of no proposed railroad merger which has failed because of changes in circumstances after the original approval of the merger agreement by the stockholders of the companies involved. No example has been cited.[62]

The statement made with reference to the Penn and the Central that *"The circumstances haven't changed"* was as surprising as it was incorrect. E-L's petition of July 8 (Exhibit E to E-L's complaint) quoted from pages 17-18 of the Proxy Statement of June 10, 1966 which the Penn distributed in connection with its Special Meeting of Stockholders held on July 21, 1966. It showed (R. 537) that the consolidated net income per share of stock of the Penn and Central for each of the years 1961-1965 was as follows (the Central figure for 1961 being a deficit):

Year	Pennsylvania	Central
1961.....	$1.31	$(1.91)
1962.....	1.53	0.03
1963.....	2.35	2.11
1964.....	4.37	5.34
1965.....	5.06	7.64

The Penn's improvement from 1961 through 1965 was $3.75 a share and the Central's was $9.55 a share.[63]

The Form IBS Reports of the two Railroad Companies show that the Penn's net income for the first six months of 1966 was 32.61% more than for the first six months of 1965 and the Central's was 80.12% more.[64]

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[62] In the case of the Atlantic Coast Line-Seaboard Air Line merger, the merger agreement was adopted on May 19, 1960 and will be carried out if a pending appeal to this Court is unsuccessful.

[63] The changes cannot be expressed in percentages, starting with 1961, because the Central had a deficit in that year. It would be ridiculous to use the Central's 1962 earnings of 3¢ a share as a base in computing a percentage improvement.

[64] The transcript of the argument of E-L's counsel on September 21 gives 62% for the Pennsylvania (R. 2779); the correct figure is 32.61%.

The proposed merger was resubmitted to the Penn and Central stockholders on July 21, 1966 and again assented to after a disclosure to them of the financial results of the operations of the two Companies on "company" and "consolidated" bases in conformity with S.E.C. requirements.

Instead of it being the case that "The circumstances haven't changed", as counsel for the New Haven Trustees said on the argument below, it is indisputable that over the four years 1962-1965 they changed drastically and the trend of the changes continued over the first six months of 1966, but despite this the stockholders of the two Railroad Companies assented again in July, 1966 to the terms which had been agreed upon four and one-half years before.

Furthermore, we have found no provision in the Joint Agreement of Merger, a copy of which is attached to the Joint Application in Finance Docket No. 21989, that authorizes either the directors or the stockholders of one of the two companies to have the merger abandoned because of a change in circumstances.

While over a period of "several years" changes endangering the merger might occur, we have already pointed out that the Commission was not dealing with the prospect of any such lengthy deferment. The risk that changes in the near future would upset the merger is so minuscule as not to be entitled to any consideration.

In view of the foregoing it seems to E-L arbitrary and capricious, within the meaning of Section 10(e) of the Administrative Procedure Act, for the Commission to have given the slightest weight to any possibility that changing conditions can so affect the "factors" that entered into the agreement of the Penn and Central to merge as to terminate their effort to merge under the present merger agreement, when the issues involved the consistency with the public interest of "prompt consummation of the merger" and adequate protection for the three carriers about which the Commission had made the findings quoted at page 18 above.

All of this was called to the attention of the three-Judge Court by E-L substantially as it is presented here. No reference thereto has been found in the majority opinion.

F. The reasons which the Commission gave as a basis for a finding that a prompt consummation of the merger would be in the public interest do not support the finding.

A study of the section of the Report of September 16 entitled "TIME OF CONSUMMATION" suggests strongly that the Commission decided first that there should be no delay in the consummation, and then considered what to do about the protective conditions.

It thus failed to take into account the need, under its own findings, for adequate protection for E-L, D&H and B&M as a condition of consummation.

Enough has been said about the reasons which the Commission gave in the September 16 Report for prompt consummation of the merger to establish that several important reasons which it advanced cannot be supported in the light of the provisions of Section 7(c), 8(b) and 10(e) of the Administrative Precedure Act, quoted above at pages 9-10.

In their response to E-L's application for a stay, Counsel for the Commission made no reply to Point I in E-L's application (p. 9-20), which covered much of the same ground as is covered above. The response of the Penn and Central said (p. 14):

> "The report on reconsideration shows that in determining that prompt consummation is in the public interest, the Commission relied principally upon the savings and improvement in service that the merger will achieve."

It is quite true that the Commission, in the section entitled "TIME OF CONSUMMATION", referred to the savings and expected improvement in service, and it may be arguable that the Commission "relied principally" on them. However, it gave other reasons as well, and a fair reading of the cited section of the Report does not justify the

conclusion that the Commission's errors with respect to the other reasons were unimportant.

Penn and Central attempt to sweep aside the Commission's arbitrary and capricious suppositions about the New Haven, which were directly attributable to the fact that it had declined to inform itself (see above, p. 68-71). But the four sentences immediately preceding the Commission's statement of its conclusion in favor of prompt consummation of the merger, quoted at page 69 above, related *solely* to the New Haven (B-15, B-16), and the New Haven was also mentioned earlier (B-15).

A careful study of the Report of September 16, in the light of the history of the proceedings and the situation which existed when the Report was handed down, strongly suggests that the Commission decided *first* to authorize a prompt consummation of the merger and considered subsequently what to do about the protective conditions. That this may well have been the case is indicated by (1) the respective locations in the Report of the sections entitled "TIME OF CONSUMMATION" (B-13 through B-16) and "PROTECTIVE CONDITIONS FOR D&H, E-L AND B&M" (B-36 through B-44); (2) the singular statement at page B-14 about the Appendix G conditions (see above, p. 36), and an additional reference to the Appendix G conditions on the same page, which would have been appropriate only if they were going to continue in effect; (3) the absence of any mention in the section entitled "TIME OF CONSUMMATION" of the protective conditions except for the references to the Appendix G conditions at page B-14; and (4) the lack of any meaningful analysis of the *relative* importance of an immediate consummation of the merger and of adequate protection for E-L, D&H and B&M.

In the April 6 Report the Commission had said, with respect to those three carriers (see above, p. 18):

> "***unless they are protected during the period necessary to determine their future, we would not au-

thorize consummation at this time, even though approving the merger."

Doubtless the Commission could have changed the conclusion thus expressed, if the change was supported by the necessary findings and an adequate statement of the Commission's reasons, but *the September 16 Report does not even indicate that the Commission gave weight, when deciding in favor of prompt consummation of the merger, to what it might determine or had determined with respect to the protective conditions* and to the effect of the Commission's determination upon "adequate transportation service to the public".

POINT III.

The majority opinion in the three-Judge Court was not based upon the reasons which the Commission had advanced for an early consummation of the merger.

It was based principally on the majority's own beliefs, suppositions and conjectures, which were not supported by anything in the record, much less by any Commission findings.

The outstanding characteristic of the majority opinion can be illustrated by analyzing what the opinion said immediately before the paragraph that stated the result and provided for the temporary restraining order (A-38, A-39):

> "However, we are not truly empowered in this case to engage in the same kind of weighing and balancing and then making our own decision as to optimum procedure that we would be if we were reviewing the action of a lower court. It is not for us to deprecate the public and private advantages of permitting the applicants to proceed with the many important projects long on the drawing board whose importance to the national welfare and defense the Commission fully understands and we do not, or to magnify out of all proportion the immediate problems of the protected roads with which the Commission is fully familiar and entirely sympathetic. The Commission surely can

> appraise far better than we what effect a year's delay of consummation would have on the jockeying of these roads and of the three plaintiffs in the C&O, B&O, and N&W actions for price and position in respect of other mergers—which, despite all the words, is what we suspect these actions to be mostly about. We would be assuming powers not confided to us if, once we have acquitted ourselves of our limited task, we were to pit our necessarily ill-informed judgment on these imponderables and their procedural entailments against the unanimous conclusion of the agency to which Congress has given authority for decision and on which it has placed responsibility for achievement."

These climactic sentences contain little to remind one of the reasons which were given by the Commission in the section of the September 16 Report entitled "TIME OF CONSUMMATION" (B-13 through B-16). Despite the modest disavowals, they indicate that the majority decision was based on its own beliefs, suppositions and conjectures.

The Commission said nothing about "important projects long on the drawing board".

The Commission said nothing about the national defense.

So far as "the protected roads" are concerned, the Court was not called upon to "magnify out of all proportion [their] immediate problems" but merely to be guided by the findings of the Commission.

Perhaps the most extraordinary statement of all is that

> "The Commission surely can appraise far better than we what effect a year's delay of consummation would have on the jockeying of these roads and of the three plaintiffs in the C&O, B&O, and N&W actions for price and position in respect of other mergers—which, despite all the words, is what we suspect these actions to be mostly about."

So far as E-L is concerned, what the majority opinion called "jockeying" for "price and position" in respect of another merger consists of the steps which E-L has taken

pursuant to paragraph 1 of Appendix O to the Commission's Report of June 24, 1964, under which, among other things, the Nickel Plate was merged into the Norfolk & Western (324 I.C.C. at 148; see above, p. 14 and footnote 14). E-L was granted the right to do what it has done not only to allow "full exploitation of the plans thus far voluntarily developed by the Erie-Lackawanna and Norfolk & Western" but "*to afford the fullest protection to the public interest*" (324 I.C.C. at 28; 327 I.C.C. at 530).

When E-L found that the N&W would not discuss the terms of E-L's inclusion in the present N&W System, E-L did precisely what the Commission intended that it should do—it filed a petition in Finance Docket No. 21510.

Far from disapproving anything that E-L has done in this connection, the Commission emphasized E-L's rights under paragraph 1 of Appendix O both in the April 6 Report (327 I.C.C. at 530) and in the September 16 Report (B-14).

Any comment that E-L has been "jockeying" is devoid of any support whatever.

There is no occasion for E-L either to assert or to deny that the C&O, B&O and N&W have been jockeying. If they or any of them have been, there is no reason why E-L should suffer on that account. C&O, B&O and N&W happen to be co-appellants on this appeal but, as stated at page 15, their position conflicts sharply with that of E-L and D&H as to what protective conditions should have been, or should be, adopted. There should be no finding of "guilt by association" simply because they are E-L's co-appellants.

It may not be amiss to say that the majority's comment about "jockeying" received national publicity.

Finally, can a reviewing Court properly make a determination based on what "we suspect these actions to be mostly about", particularly when there is nothing to justify

the suspicion and it happens to be wrong, at least in the case of E-L?

There are many other examples which could be given to illustrate what has been said in the heading of this Point. We will mention only three more.

1.

In footnote 4 at page A-10, the majority said:

> "* * * it is rather obvious that if N&W and the protected roads were to cooperate in arriving on terms by which N&W can fulfill its obligations, the protective period would be quite short. The State of New York, which is served by all three protected lines, as well as by the proposed merged carrier, argues with some plausibility that consummation of the merger would act as a spur to bringing these roads and the N&W together on a basis fair to all; the Commission could well have had that in mind when authorizing immediate consummation."

As we have just shown, the majority had no basis for any implication that E-L (or, so far as we know, any of the other "protected roads") had failed to "cooperate" in attempting to reach terms with the N&W. If the N&W has failed to cooperate, why should E-L and the "shipping public which depends upon [E-L] for transportation"[65] be penalized?

The argument which the majority considered had "some plausibility" was simply a notion advanced by counsel for the State of New York before the three-Judge Court (R. 2894-2899). We do not find that the same counsel for the State of New York put forward such a notion in the State's reply, filed August 1 with the Commission, to the petitions for reconsideration or in the memorandum which he filed in this Court in opposition to the applications for a stay. Counsel seems to have indulged in this conjecture only once.

Nor have we found any suggestion, much less a finding by the Commission, that would support the characterization

[65] Commission Report of April 6, Appendix G, section 8; 327 I.C.C. at 563. See also the reference in the second finding quoted at page 18 above to "service to their shippers and connections".

of counsel's notion as having "some plausibility". The majority spoke of what "the Commission could well have had * * * in mind"; it is hardly necessary to observe that the Acts which govern this case do not contemplate that a Court's review of Commission orders shall be influenced by conjectures of that kind.

2.

At page A-20 the majority opinion says:

> "The long delay to which the applicants have already been subjected argues strongly in favor of letting them get ahead with the job, as the Commission unanimously thought, rather than against it."

We have found nothing in the Commission's Reports to indicate that the Commission thought that "the long delay to which the applicants have already been subjected argues strongly in favor of letting them get ahead with the job."

The majority's use of the words "long delay" is certainly unclear. Do they imply that there has been unnecessary delay? The opinion is replete with compliments of the Commission under whose control the proceedings have been throughout. If there has been unnecessary delay, who has been responsible?

As to E-L and its "shippers and connections", whose protection is involved, there is no suggestion in any Commission Report that E-L has been responsible for any delay which should have been avoided.

3.

At page A-38, when undertaking to appraise the "protected lines'" jeopardy, the majority spoke of "the minor share of their traffic that is in jeopardy" and "the negligible hazard even to that over the next few months".

There is no basis in the Commission's findings or the record for any statement that the share of E-L's traffic which could be diverted as a result of the Penn-Central merger is "minor". The Commission's findings are directly to the contrary.

With respect to the possibilities of diversions from the protected carriers and the effects thereof, the words used by the Commission were "adversely affected * * * to a serious degree", "severely handicapped in providing required transportation", "serious weakening" and "substantially less capable of providing service" (see above, p. 18).

Furthermore, the Court below had before it an affidavit of E-L's President, Gregory W. Maxwell, saying (R. 947):

> "In my judgment a merged Penn-Central would be expected to divert many millions of dollars of revenues from E-L unless prevented from doing so by adequate conditions which protected E-L from the effects of the merger."

Even one unfamiliar with railroad operations would normally assume, on reading the descriptions of Penn, Central and E-L in E-L's complaint (par. 7, p. 3-4; R. 352-353), which are summarized above (p. 11), that the giant Penn-Central could divert a large part of E-L's traffic, as the Commission found it could.

As to the hazards, enough has already been said.

POINT IV.

Even if the four factors which the majority below said they considered in determining whether to grant an interlocutory injunction were controlling in this Court, the Order in the Court below should be reversed.

The majority below indicated that in determining whether or not to grant an interlocutory injunction it should consider the following four factors (A-16, A-17):

> "(1) Whether the petitioner has made 'a strong showing that it is likely to prevail on the merits';
>
> (2) Whether the petitioner has shown that without interim relief it will have been irreparably injured if it ultimately prevails;

(3) Whether the issuance of a stay would substantially harm the parties opposing it if they ultimately prevail; and

(4) Whether the public interest will have been adversely affected by a stay if the validity of the order is ultimately sustained."

In view of what has been said at pages 33-34 above, any discussion of the "four factors" may be superfluous or irrelevant. Certainly it should be brief.

As to (1), E-L believes that it should prevail on the merits, on the record before the Court below. There has been no showing that it is likely that there would be a different outcome as a result of the introduction of evidence at a hearing.

If E-L is correct as to (1), then (3) and (4) need not be considered, as neither would be applicable unless E-L failed to prevail.

As to (2), enough has already been said to establish that, without interim relief, E-L would have been irreparably injured. Its jeopardy would have been immeasurable, both as to the period during which it would last and as to what would happen during that period. A principal basis for the majority's conclusion to the contrary was their unsupported and mistaken view that only a "minor share" of E-L's traffic would be in jeopardy (see above, p. 81-82).

The stay granted by this Court has, of course, constituted interim relief to an appreciable extent, but it cannot be reasonably concluded that that stay, by itself, will keep E-L from being irreparably injured.

CONCLUSION

The appellant believes that it is entitled to have the District Court's Order of October 4, 1966 reversed and the case remanded to that Court with instructions to enter an order

(1) enjoining, annulling and setting aside the Commission's Orders of April 6, 1966 and September 16,

1966 insofar as either such Order approves and authorizes the consummation of a merger of The New York Central Railroad Company into The Pennsylvania Railroad Company; and

(2) remanding the case to the Commission for further proceedings consistent with this Court's opinion.

E-L does not ask that the Commission be precluded from proceeding with the further hearing under the Commission's Order of September 29, 1966 (C-1, C-2) which was not stayed by this Court's Order of October 18, 1966 and which commenced on October 31, 1966.

Nor does E-L ask that Penn, Central or New Haven be prevented from going forward with the steps contemplated by section 8 of Appendix A to the April 6 Report, looking toward the ultimate inclusion of the New Haven in a Penn-Central System (327 I.C.C. at 553). Specifically, but not exclusively, E-L does not ask that there be any stay of the hearing on a consolidated record, relating to the inclusion of the New Haven, which is scheduled to commence on January 16, 1967 pursuant to a Commission Order dated November 9, 1966.

November 30, 1966.

Respectfully submitted,

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